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The Application of Material Witness Provisions: A Case Study - Are Homeless Material Witnesses Entitled to Due Process and Representation by Counsel

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1991]

Notes

THE APPLICATION OF MATERIAL WITNESS PROVISIONS: A CASE STUDY—ARE HOMELESS MATERIAL WITNESSES ENTITLED TO DUE PROCESS AND REPRESENTATION BY COUNSEL?

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I. INTRODUCTION

On October 11, 1984, Clyde White, a homeless resident of Chattanooga, Tennessee, witnessed the murder of Francis Willard Smith.¹ After having been interrogated by a police detective, White was arrested and brought before the city court.² The presiding judicial officer, pursuant to the Tennessee material witness provisions,³ set White's bail at

1. *White ex rel. Swafford v. Gerbitz*, 892 F.2d 457, 458 (6th Cir. 1989). Because White brought a similar but separate action against different defendants in 1988, the central case against the judicial officers and the city discussed herein will be referred to as *White II* and the earlier case, *White ex rel. Swafford v. Gerbitz*, 860 F.2d 661 (6th Cir. 1988), *cert. denied*, 489 U.S. 1028 (1989), against the District Attorney, *et al.*, will be referred to as *White I*.

2. *White II*, 892 F.2d at 458-59. The material witness legislation as part of the Tennessee bail statute under which White was detained does not explicitly authorize the arrest and detention of a material witness, but it does specifically state that the court has the authority to order a witness to post bail. TENN. CODE ANN. § 40-11-110 (1990). In *White II*, the Sixth Circuit discussed this issue with regard to the district court's evaluation that the authority to arrest and detain witnesses did in fact exist. *White II*, 892 F.2d at 460. The Sixth Circuit concluded that "[t]he district court properly recognized that [the material witness] statute inherently contemplates that material witnesses are subject to arrest and detention under appropriate circumstances. Such an interpretation is necessary to effectuate the statutory authority given to courts to impose bail on material witnesses." *Id.* at 460.

3. TENN. CODE ANN. § 40-11-110. The relevant sections of the Tennessee statute are listed below. Section 40-11-110 provides:

Bail for material witness. — If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that the witness has refused or will refuse to respond to process, the court may require him to give bail under § 40-11-117 or § 40-11-122 for his appearance as a witness, in an amount fixed by the court. If the person fails to give bail, the court may commit him to the custody of the sheriff pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time, and may modify at any time the requirement as to bail. If the person does not comply with the conditions of the bail bond, the court having jurisdiction shall enter an order declaring the bail to be forfeited as provided in § 40-11-120 or § 40-11-139.

TENN. CODE ANN. § 40-11-110 (1990).

Section 40-11-115 provides:

Release on recognizance or unsecured bond—Factors considered. —

(a) Any person charged with a bailable offense may, before a magistrate authorized to admit him to bail, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the magistrate.

(b) In determining whether or not such person shall be released as provided herein and that such a release will reasonably assure the ap-

\$500 to secure White's presence at the trial of Gregory Denson, the suspected murderer.⁴ As a consequence of White's indigence and his inability to pay the bail, he remained imprisoned for 288 days.⁵

The requirement of bail or recognizance is a common procedure utilized in the treatment of material witnesses throughout the country.⁶ In circumstances when the witness is either indigent or homeless, how-

pearance of the person as required, the magistrate shall take into account:

- (1) The defendant's length of residence in the community;
- (2) His employment status and history and his financial condition;
- (3) His family ties and relationships;
- (4) His reputation, character and mental condition;
- (5) His prior criminal record including prior releases on recognizance or bail;
- (6) The identity of responsible members of the community who will vouch for defendant's reliability;
- (7) The nature of the offense and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of nonappearance; and
- (8) Any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.

TENN. CODE ANN. § 40-11-115 (1990).

Section 40-11-116 provides:

Conditions on release. — (a) If a defendant does not qualify for a release upon recognizance under § 40-11-115, then the magistrate shall impose the least onerous conditions reasonably likely to assure the defendant's appearance in court.

(b) If conditions on release are found necessary, the magistrate may impose one (1) or more of the following conditions:

(1) Release the defendant into the care of some qualified person or organization responsible for supervising the defendant and assisting him in appearing in court. Such supervisor shall maintain close contact with the defendant, assist him in making arrangements to appear in court, and, where appropriate, accompany him to court. The supervisor shall not be required to be financially responsible for the defendant, nor to forfeit money in the event he fails to appear in court.

(2) Place the defendant under the supervision of an available probation counselor or other appropriate public official.

(3) Impose reasonable restrictions on the activities, movements, associations and residences of the defendant.

(4) Impose any other reasonable restriction designed to assure the defendant's appearance, including but not limited to the deposit of bail pursuant to § 40-11-117.

TENN. CODE ANN. § 40-11-116 (1990).

Section 40-11-117 provides:

Bail Security required. — Absent a showing that conditions on a release on recognizance will reasonably assure the appearance of the defendant as required, the magistrate shall, in lieu of the conditions of release set out in § 40-11-115 or § 40-11-116, require bail to be given.

TENN. CODE ANN. § 40-11-117 (1990).

4. *White II*, 892 F.2d at 459.

5. *Id.*

6. For state and federal material witness provisions pertaining to bail or recognizance, see *supra* note 3 and *infra* notes 25, 26, 37, 39, 199, 239 and accompanying text.

ever, the application of such procedures can result in the most severe consequences.

In White's case, after his release following ten months imprisonment, he brought an action, pursuant to section 1983 of the Civil Rights Act,⁷ alleging that the judicial officers, the arresting officer and the city of Chattanooga had violated his civil rights.⁸ The trial court granted summary judgment for the defendants and the United States Court of Appeals for the Sixth Circuit affirmed.⁹

This Note questions the constitutionality of the Tennessee statute with regard to a material witness' rights under the fourth, fifth, eighth and fourteenth amendments, with specific concentration on the right to counsel.¹⁰ Before specifically addressing the Tennessee statute, however, this Note will first examine the general rationale behind material witness statutes and the development of the comprehensive federal bail legislation, codified in the Bail Reform Act of 1984 (Bail Reform Act), which in part addresses the treatment of material witnesses.¹¹ Various state statutes will also be evaluated, focusing on the disparity between these statutes and the provisions of the Bail Reform Act.¹² Finally, this Note will analyze the procedures employed by the Tennessee judicial officers in *White ex rel. Swafford v. Gerbitz*,¹³ concentrating on the methods utilized in setting White's bail, which effectively assured his prolonged incarceration, as well as those rights which, if exercised, may have remedied White's situation.¹⁴

II. BACKGROUND

A. *The History and Development of the Federal Material Witness Provisions*

Since 1789, the federal courts have possessed the authority to arrest

7. 42 U.S.C. § 1983 (1988). For the text of § 1983, see *infra* note 179.

8. *White II*, 892 F.2d at 458. White alleged that his arrest and initial detention was violative of his federal due process rights, that he had been "subjected to an unlawful seizure" and that his detention had constituted "cruel and inhumane treatment." *Id.* at 460. White's action also included several pendent claims under state law regarding the Tennessee material witness provisions and his arrest pursuant to such provisions. *Id.*

9. *Id.* at 464. The Sixth Circuit qualified its dismissal by stating that although the § 1983 claim was properly dismissed, the court "certainly d[oes] not condone White's extended incarceration as a material witness." *Id.*

10. For a discussion of cases in which fourth, fifth, eighth and fourteenth amendment rights were raised, see *infra* notes 30-35, 47-107 and accompanying text.

11. 18 U.S.C. §§ 3142, 3144 (1988). For the relevant text of these sections, see *infra* note 26.

12. For the text of the state statutes discussed herein, see *infra* notes 25, 39, 199 & 239.

13. 892 F.2d 457 (6th Cir. 1989). For an explanation of the difference between *White II* and what will be referred to as *White I*, see *supra* note 1.

14. For an analysis of release procedures that may have expedited White's release, see *infra* notes 141-54, 225 and accompanying text.

and detain material witnesses.¹⁵ Although the federal system today still allows a witness to be arrested and detained pursuant to the required showings, the statute under which such action is authorized has undergone vast changes in an attempt, in part, to safeguard the rights of material witnesses. Almost all legislation authorizing the arrest or detention of material witnesses, both in the federal system and in the state systems, requires a showing that the witness' testimony is material and that it would be otherwise impracticable to secure his appearance at trial. A court's authority to order the arrest and detention a material witness has been justified by the sixth amendment confrontation clause mandating that "[i]n all criminal prosecutions . . . the accused shall enjoy the right to be confronted with the witnesses against him."¹⁶ Furthermore, the

15. Kling, *A Mandatory Right to Counsel for the Material Witness*, 19 U. MICH. J.L. REF. 475, 476-77 (1986). An earlier material witness provision, 28 U.S.C. § 659 (1928) (repealed 1952), read as follows:

Any judge of the United States, on the application of a district attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial of any criminal proceeding in which the United States are parties or are interested, may compel such person to give recognizance, with or without sureties, at his discretion, to appear to testify therein; and, for that purpose, may issue a warrant against such person, under his hand, with or without seal, directed to the marshall or other officer authorized to execute process in behalf of the United States, to arrest and bring him such person. If the person so arrested neglects or refuses to give recognizance in the manner required, the judge may issue a warrant of commitment against him, and the officer shall convey him to the prison therein. And the said person shall remain in confinement until he is removed to the court for the purpose of giving his testimony, or until he gives the recognizance required by said judge.

28 U.S.C. § 659 (1928) (repealed 1952). Following the repeal of this provision, the legislature enacted Rule 46(b) of the Federal Rules of Criminal Procedure; until 1972, Rule 46(b) provided the following:

If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness in an amount fixed by the court or commissioner. If the person fails to give bail, the court or commissioner may commit him to the custody of the marshall pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement of bail.

FED. R. CRIM. P. 46(b) (amended 1972). Following the enactment of the Bail Reform Act of 1966, Rule 46(b) was amended as follows:

A person released before trial shall continue on release during trial under the same terms and conditions as were previously imposed unless the court determines that other terms and conditions or termination of release are necessary to assure his presence during the trial or to assure that his conduct will not obstruct the orderly and expeditious progress of the trial.

FED. R. CRIM. P. 46(b). The Bail Reform Act of 1984 was later codified and the present federal material witness provisions were enacted. 18 U.S.C. §§ 3142, 3144 (1988). For the full text of § 3144, see *infra* note 26.

16. *United States v. Eufracio-Torres*, 890 F.2d 266, 269 (10th Cir. 1989),

necessity of maintaining a fair and effective judicial system has also been held to warrant the detention of a material witness.¹⁷

In 1929, *Barry v. United States ex rel. Cunningham*¹⁸ presented one of the earliest challenges to the constitutionality of material witness detention.¹⁹ In *Barry*, the United States Supreme Court affirmed the constitutionality of the power possessed by the United States Senate to authorize the arrest of a material witness upon a showing that the witness would not voluntarily attend a Senate hearing.²⁰ The Supreme

cert. denied, 110 S. Ct. 1306 (1990) (quoting U.S. CONST. amend. VI). For the text of the sixth amendment, see *supra* note 48. The Tenth Circuit, reviewing a defendant's right to confront the witnesses against him as opposed to confronting deposition testimony, quoted the Supreme Court as follows:

The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that "a primary interest secured by [the clause] is the right of cross-examination." In short, the Clause envisions "a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

Eufrazio-Torres, 890 F.2d at 269 (quoting *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980) (footnote and citations omitted)).

17. See *Comfort v. Kittle*, 81 Iowa 179, 181-85, 46 N.W. 988, 989-90 (1890) (reviewing that legislature's role in statutorily authorizing courts to require that a witness post bail in order to secure his testimony); Comment, *Witnesses - Imprisonment of the Material Witness for Failure to Give Bond*, 40 NEB. L. REV. 503, 512 n.45 (1961) (citing letter from Edward S. Silver, District Attorney of Kings County, New York, January 11, 1960 which read:

The prosecutor will favor this type of statute, knowing full well that innocent people are to be deprived of their liberty. Such deprivation, however, flows naturally from the efforts of maintaining an organized and civilized society. The forces of evil will not hesitate to tamper with a witness, and sometimes the forces of fear are more potent. The prosecutor must preserve his evidence. If to do this an innocent person is to be jailed, it is the sacrifice he must make as his contribution to law and order.).

For the Supreme Court's view of a citizen's duty to testify, see *infra* notes 48-50 and accompanying text.

18. 279 U.S. 597 (1929).

19. *Id.*

20. *Id.* at 599. In *Barry*, the Court stated that the constitutionality of the federal statute allowing for the arrest and confinement of a material witness has never been contested. *Id.* at 617. In its review of this authority, the Court relied on *United States v. Lloyd and State of Minnesota ex rel. Howard v. Grace*. *Id.* (citing *United States v. Lloyd*, 26 F. Cas. 984 (S.D.N.Y. 1860) (No. 15, 614) (validity of federal statute authorizing detention of witness as well as release pursuant to offer of recognizance of \$1000); *State of Minn. ex rel. Howard v. Grace*, 18 Minn. 398 (1872) (validity of state material witness provision upheld)). The Court in *Barry*, quoting the *Grace* court, stated the following: "The law intends that the witness shall be forthcoming at all events, and it is a lenient mode which it provides to permit him to go at large upon his own recognizance. However this is only one mode of accomplishing the end, which is his due appearance." *Id.* (citation omitted). Based partially on the aforementioned evaluation, the

Court stated that "a court has power in the exercise of a sound discretion to issue a warrant of arrest without a previous subpoena . . . and that such person may be confined until removed for the purpose of giving his testimony."²¹

Since *Barry*, federal legislation regarding the circumstances of arrest, detention and release of material witnesses has been developed in an attempt to ensure that witnesses will not be subject to unnecessary incarceration.²² Today, section 3144 of the Bail Reform Act authorizes the arrest of a witness where "it appears from an affidavit . . . that the testimony of a person is material in a criminal proceeding" and that "it may become impracticable to secure the presence of the person by subpoena."²³ The Bail Reform Act further provides that a witness cannot be detained simply "because of [his] inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice."²⁴ This provision was intended to assure that a witness would not be unnecessarily detained solely because of his inability to post bail.²⁵ Section 3144 of the Bail Reform Act also refers the court

Court concluded that "[t]he Senate, having sole authority under the Constitution to judge of the elections, returns and qualifications of its members, may exercise in its own right the incidental power of compelling the attendance of witnesses without the aid of a statute." *Id.* at 619.

21. *Id.* at 616-17 (quoting 28 U.S.C. § 659 (1928) (repealed 1952)). The Court went on to further note that, where suspicions exist that a witness may disappear, or be spirited away, before trial, in criminal cases . . . he may be held to bail to appear at the trial and may be committed on failure to furnish it, and that such imprisonment does not violate the sanctions of the federal or state constitutions.

Id. at 618.

22. Recently, Congress revised the federal material witness provisions along with provisions regarding the detention of defendants in criminal prosecutions. The legislation was passed in its new form in 1984 as the Bail Reform Act. For a general discussion of the Bail Reform Act and its implications, see *United States v. Salerno*, 481 U.S. 739 (1987) (Court upheld validity of Bail Reform Act of 1984 in response to petitioner's challenge of facial unconstitutionality); Berg, *The Bail Reform Act of 1984*, 34 EMORY L.J. 685 (1985); Comment, *United States v. Salerno: "A Loaded Weapon Ready for the Hand,"* 54 BROOKLYN L. REV. 171 (1988); Note, *The Effect of Salerno v. United States on the Use of State Preventive Detention Legislation: A New Definition of Due Process*, 22 GA. L. REV. 805 (1988).

23. 18 U.S.C. § 3144 (1988). For the text of this section, see *infra* note 26.

24. *Id.* The prior federal material witness provision contained an almost identical qualification. 18 U.S.C. § 3149 (1970) (repealed 1984) (current version at 18 U.S.C. § 3141 (1988)). However, the Tennessee statute involved in *White* does not contain this type of safeguard which works to release the witness as soon as his testimony can be sufficiently secured. TENN. CODE ANN. § 40-11-110.

25. See 18 U.S.C. § 3144 (1988). Although the federal legislation mandates that a witness should not be incarcerated merely because he is financially unable to post bail, state legislation is not so clear. For example, the Tennessee statute says nothing about the problems which arise when a witness is indigent and

to section 3142 which outlines the release procedures applicable to both detained witnesses and criminal defendants.²⁶

therefore subject to detention solely because of his inability to post bail. TENN. CODE ANN. § 40-11-110. The New Jersey material witness provision, in comparison, simply states that the judicial official:

shall, when in his judgement the ends of justice so require, bind by recognizance, with sufficient surety, any person who shall declare against another person for any crime punishable by death or imprisonment in the state prison, or any person who can give testimony against any person so accused of any such crime, whether the offender be arrested, imprisoned, bailed or not.

N.J. STAT. ANN. § 2A:162-2 (West 1985). Other statutes guide the court so that an indigent witness will be released without posting bond in particular circumstances; for example the Massachusetts statute reads as follows:

A witness who, when required, refuses to recognize, either with or without sureties, shall, except as provided in the following section, be committed to jail until he complies with such order or is otherwise discharged; but if the court or justice finds that the witness, unless he is the prosecutor or accomplice, is unable to procure sureties when so ordered, he shall, except in cases of felony, be discharged upon his own recognizance. Upon a complaint or indictment for a felony, against a defendant not in custody, a material witness committed for failure to furnish sureties upon his own recognizance may be held in custody for a reasonable time, pending the pursuit and apprehension of the defendant.

MASS. GEN. LAWS ANN. ch. 276, § 49 (West 1972). It should be noted, however, that this statute, although attempting to protect an indigent witness from detention under circumstances where the defendant has been charged with something other than a felony, allows for the detention of the witness when the search for the defendant is ongoing. *Id.* For a general discussion of state material witness procedures, see *infra* notes 36-41 and accompanying text.

26. 18 U.S.C. § 3142(a)(1) (1988). Section 3144 provides:

If it appears from an affidavit filed by a party that the *testimony of a person is material* in a criminal proceeding, and if it is shown that it may become *impracticable to secure the presence of the person by subpoena*, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. *No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice.* Release of a material witness may be delayed for a *reasonable* period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

18 U.S.C. § 3144 (1988) (emphasis added).

Section 3144 refers the court directly to § 3142 which contains a comprehensive list of potential conditions to which the court may subject the witness if the court feels that his testimony is in jeopardy. Section 3142 provides in pertinent part:

(a) *In general.* Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be —

- (1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;
- (2) released on a condition or combination of conditions under subsection (c) of this section;
- (3) temporarily detained to permit revocation of conditional re-

The least stringent of the conditions found in section 3142 is the release of a witness on his own recognizance.²⁷ If the court finds, how-

lease, deportation, or exclusion under subsection (d) of this section; or

(4) detained under subsection (e) of this section.

....
(c) *Release on conditions.* (1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person . . . such judicial officer shall order the pretrial release of the person —

(A) subject to the condition that the person not commit a Federal, State or local crime during the period of release; and

(B) subject to the *least restrictive further condition*, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person —

(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) maintain employment, or, if unemployed, actively seek employment;

(iii) maintain or commence an educational program;

(iv) abide by specified restrictions on personal associations, place of abode, or travel;

....
(vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) comply with a specified curfew order;

(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance . . . ;

(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the person as required . . . ;

(xii) execute a bail bond with solvent sureties in such amount as is reasonably necessary to assure the appearance of the person as required;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required

(2) The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

18 U.S.C. § 3142 (emphasis added).

27. 18 U.S.C. § 3142(b) (1988). This section enables the judicial officer to release the witness on his own recognizance "unless the judicial officer deter-

ever, that an unrestricted release will not guarantee a witness' attendance at trial, the court may impose conditions on his release such as requiring that the witness "remain in the custody of a designated person" or "maintain . . . or . . . seek employment . . . or commence an educational program."²⁸ The federal statute further requires the court to utilize the least restrictive measure which will effectively ensure the witness' presence at trial.²⁹ Yet, the decision as to the particular circumstances of release or incarceration remains within the broad discretion of the court.

The present federal material witness legislation contains two significant provisions which seek to ensure that a witness will be treated in accordance with the constitutional requirements of due process under the fifth amendment.³⁰ The first provision requires that the court re-

mines that such release will not reasonably assure the appearance of the [witness]." *Id.*

28. 18 U.S.C. § 3142(c) (1988). For the full text of this section, see *supra* note 26.

29. 18 U.S.C. § 3142(c)(1)(B) (1988). For the language of the federal material witness statute requiring that the court impose the "least onerous" treatment upon the witness, see *supra* note 26.

The Tennessee statute under which White was held refers the court to § 40-11-117 which in turn refers the court to § 40-11-116 wherein it is stated that "the magistrate shall impose the least onerous conditions reasonably likely to assure the defendant's appearance in court." TENN. CODE ANN. § 40-11-116 (1990). For the complete text of this statute, see *supra* note 3.

30. U.S. CONST. amend. V. The fifth amendment, in pertinent part, reads: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall [any person] be compelled in any criminal cases to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law

Id. The due process rights under the fifth amendment, and those under the fourteenth amendment as applied to the states, have been held to attach in certain civil matters as well as criminal procedures where an individual's liberty is being threatened. See, e.g., *Vitek v. Jones*, 445 U.S. 480 (1980) (holding fourteenth amendment due process rights applicable to liberty interests of state prisoner before involuntary transfer to state mental hospital); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (due process rights under fourteenth amendment attach upon potential revocation of parole); *United States v. Eufracio-Torres*, 890 F.2d 266 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1306 (1990) (holding fifth amendment due process rights attach upon possible detention of material witness of witness); *Application of Cochran*, 434 F. Supp. 1207, 1212 (D. Neb. 1977) (holding due process protection required when state "physically seizes a person and then commits him to complete custodial detention for an extended period of time").

In *Morrissey*, the petitioners, seeking a writ of habeas corpus, argued that they had been denied due process under the fourteenth amendment when "their paroles had been revoked without a hearing." *Morrissey*, 408 U.S. at 474. In determining the extent of a parolee's due process rights, the Court stated that "liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." *Id.* at 482. Having evaluated a parolee's liberty interests, the Court set forth the following "minimum requirements" for revocation of parole:

(a) written notice of the claimed violations of parole; (b) disclosure to

lease the witness, "subject to the least restrictive . . . condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required."³¹ The second provision, part of section 3142(f) of the Bail Reform Act, requires that a hearing be held to determine what particular conditions could be appropriately and justifiably placed on the witness' release; and that the witness be afforded "the right to be represented by counsel [at this hearing], and, if financially unable to obtain adequate representation, to have counsel appointed."³² The first provision requires the court to review the circumstances behind the witness' arrest and to inquire into whether the witness is responsible, reliable and willing to appear before the court at a later date.³³ Such an inquiry will aid the court in its determination of what restrictions, if any, are to be imposed upon the witness' detention or release.³⁴ The second provision, which provides for adequate representation, may facilitate the witness' release; for example, counsel may move for a reduction in bail or for an order that the witness be deposed pursuant to the Federal Rules of Criminal Procedure.³⁵

the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses . . . ; (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id. at 489.

31. 18 U.S.C. § 3142 (1988). The former material witness legislation, 18 U.S.C. § 3149 (1970) (repealed 1984), referred the court to § 3146 which merely stated that the "judicial officer shall . . . impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial." 18 U.S.C. § 3146 (1970) (repealed 1984) (current version at 18 U.S.C. § 3144 (1988)). Apparently, the conditions are listed in order from the least onerous to the most severe. *Id.* Although this provision did list factors for the court to consider in making its determination, the statute as a whole was less comprehensive than today's Bail Reform Act. For the complete language of § 3149, see *infra* note 67. Presently, § 3144 of the Bail Reform Act directs the court to § 3142, which sets forth a comprehensive list of potential release conditions applicable to both defendants and witnesses. 18 U.S.C. § 3142. For references to the Bail Reform Act as a whole, see *supra* note 22.

32. 18 U.S.C. § 3142(f) (1988).

33. 18 U.S.C. § 3142(c)(1)(B) (1988). This section contains a list of potential factors and conditions relevant to the determination of a suitable release for the witness including court appointed supervision, employment, education and avoidance of drug or alcohol use. *Id.* In applying this section to a material witness' release, a judicial officer would be directed to this list of conditions whereby the witness' characteristics and circumstances could be evaluated to determine what would "reasonably assure the appearance of the person as required." *Id.* For the complete list of conditions offered by § 3142, see *supra* note 26.

34. For a discussion of the Bail Reform Act, see Berg, *supra* note 22.

35. FED. R. CRIM. P. 15(a). For the text of Rule 15(a), see *infra* text accompanying note 146.

B. *The Treatment of Material Witnesses Throughout the States*

The federal provisions governing the treatment of material witnesses, set forth in the Bail Reform Act, were reformed, in part, as an attempt to ensure that witnesses would not be deprived of their liberty unnecessarily. Such reform, however, has not occurred consistently throughout the states.³⁶ One of the most important distinctions between the state and federal provisions is that many states do not grant a material witness the option of having court appointed counsel as does section 3142 of the Bail Reform Act.³⁷ Consequently, without the protection of effective representation, a material witness may suffer prolonged and unnecessary incarceration despite a lack of probable cause, the failure of the judicial officer to inquire properly into the witness' willingness to appear as defined by the statute, or an affidavit that fails to include the statutorily required showings.³⁸ Furthermore, as discussed below, without the assistance of counsel, collateral attacks contesting a witness' incarceration are extremely rare.

Although they lack the safeguards of the federal system, the state statutes have been generally upheld.³⁹ For example, the New Jersey ma-

36. See Kling, *supra* note 15, at 480-81 n.37 (citing particular state statutes varying in procedural and substantive treatment of material witnesses).

The Bail Reform Act arms a witness with various remedial measures which he can pursue to expedite his release. 18 U.S.C. §§ 3142, 3144 (1988). For the full text of these statutes, see *supra* note 26. Section 3142 applies specifically to the treatment of defendants awaiting criminal proceedings. 18 U.S.C. § 3142. Although the primary federal material witness provision is § 3144, that section makes reference to § 3142 regarding the treatment of witnesses. 18 U.S.C. § 3144.

Many of the states have not followed the federal system's lead and have failed to reexamine their own statutes, at least with respect to the possibility that their statutes deprive a witness of his right to due process under the law. See Kling, *supra* note 15, at 480-81 n.37. For example, the Tennessee bail statute, enacted in 1978, neither guarantees a witness the assistance of counsel, nor specifically provides for the taking of a deposition as an alternative to detention. TENN. CODE ANN. § 40-11-110 (1990). For the full text of this statute, see *supra* note 3. For a discussion of the necessity of counsel and the federal response to such necessity, see *infra* notes 101-07, 109-27 and accompanying text.

37. See 18 U.S.C. §§ 3142, 3144 (1988). For state statutes and constitutions also affording a right to counsel, see COLO. CONST. art. II, § 17; KAN. STAT. ANN. § 22-2805 (1988); MASS. GEN. LAWS ANN. ch. 276, § 47 (West 1972); N.Y. CRIM. PRO. LAW § 620.40 (McKinney 1984); N.C. GEN. STAT. § 15A-803 (1989); OKLA. STAT. ANN. tit. 22, § 719 (West 1969 & Supp. 1991).

38. See *White II*, 892 F.2d at 463 (affidavit presented to court failed to include necessary showings that witness's testimony was material and that he would refuse to respond to process).

39. See, e.g., *White II*, 892 F.2d 457; *In re Grzyeskowitak*, 267 Mich. 697, 255 N.W. 359 (1934); *People ex rel. Van Der Beek v. McClosky*, 18 A.D.2d 205, 210, 238 N.Y.S.2d 676, 682 (1963).

In *Grzyeskowitak*, the Michigan Supreme Court granted a writ of habeas corpus requested by a material witness held pursuant to the following statute:

Whenever it shall appear to any court of record that any person is a material witness in any criminal case pending in any court in the county

terial witness provision, as part of the New Jersey Bail & Recognizance Statute, authorizes a judicial officer "when in his judgment the ends of justice so require, [to] bind by recognizance, with sufficient surety, any person who shall declare against another person for any crime punishable by death or imprisonment" ⁴⁰ Another section of the New Jersey statute provides that the "witness shall [neither] be kept in the same apartment with . . . the person[] charged" nor suffer "further restrict[ion] of [his] liberty than is necessary." ⁴¹ Such statutory language should work to protect a witness' liberty interests. Nevertheless, where a judicial officer fails to act in accordance with the relevant statutory authority, the effective assistance of counsel becomes crucial in protecting the witness' rights. Moreover, the number and degree of incidents in which a witness is held in violation of statutory authority unrepresented by counsel are virtually impossible to determine due to the lack of factual documentation surrounding such cases.

and that there is danger of the loss of testimony of such witness unless he be required to furnish bail or be committed in the event that he fails to furnish such bail, said court . . . shall require such witness to be brought before him and after giving him an opportunity to be heard, if it shall appear that such witness is a material witness and that there is danger of the loss of his testimony unless he furnish bail or be committed, said court may require such witness to enter into a recognizance . . . in such amount as the court may determine

Grzyeskowitak, 267 Mich. at 699, 255 N.W. at 360 (citation omitted). As the government, in *Grzyeskowitak*, had not yet indicted anyone for the murder, the petitioner argued that he should be released because "the proceedings might otherwise amount to life imprisonment without due process of law in the event that the murderer were never apprehended." *Id.* at 701, 255 N.W. at 360-61. The court granted the writ "upon condition that petitioner enter into a personal recognizance to appear as a witness at the trial." *Id.* at 702, 255 N.W. at 361.

In reviewing the New York material witness statute, affirmed the lower court's denial of petitioner's writ of habeas corpus. 18 A.D.2d at 210, 238 N.Y.S.2d at 682. In *McClosky*, the witness was committed to the sheriff's custody for 30 days when he failed to post bail in the amount of \$30,000, pursuant to the New York statute in effect at the time. *Id.* at 207, 238 N.Y.S.2d at 679. In light of the statutory provision mandating that a witness be entitled to the assistance of counsel upon request, the court stated that it would be "appropriate that the Justice, in the exercise of discretion, before whom the matter is brought, should, even in the absence of any such request, inquire if the person desired counsel." *Id.* at 209, 238 N.Y.S.2d at 682. Although the witness had not received the assistance of counsel, the court denied habeas corpus relief because there was no "fundamental unfairness or resulting prejudice from the failure of appellant to have counsel . . . so as to constitute a denial of due process." *Id.* at 210, 238 N.Y.S.2d at 682; see also Carlson, *Jailing the Innocent: The Plight of the Material Witness*, 55 IOWA L. REV. 1 (1969) (overview of state material witness statutes and constitutional considerations); Comment, *Witnesses—Imprisonment of the Material Witness for Failure to Give Bond*, 40 NEB. L. REV. 503 (1961) (discussing constitutional issues regarding material witness detention and benefit of such statutes).

40. N.J. STAT. ANN. § 2A:162-2 (West 1985). For the full text of this section, see *supra* note 25. For similar provisions in other states, see *supra* note 39 and *infra* notes 199 & 239.

41. N.J. STAT. ANN. § 2A:162-3 (West 1985).

C. *Constitutional Challenges*

Various constitutional claims have been raised by material witnesses protesting their incarceration. It has been argued that the following rights attach upon the arrest or detention of a witness: (1) the fourth amendment right to be free from unreasonable seizures and arrests based on warrants unsupported by probable cause;⁴² (2) the fifth amendment rights of due process including the right to be heard;⁴³ (3) the eighth amendment rights to be free from excessive bail and cruel and unusual punishment;⁴⁴ and (4) the fourteenth amendment right of due process in state proceedings.⁴⁵ Essentially, these challenges are based on the premise that material witness provisions deny a witness his liberty without due process of law.⁴⁶

1. *The Fourth Amendment and the Probable Cause Requirement*

As explained above, material witness provisions address the treatment of a witness who is unlikely to appear at trial unless the court places sufficient restrictions on his liberty.⁴⁷ The justification for such treatment, which can amount to the arrest and detention of a witness, can be found in the sixth amendment, which guarantees anyone accused of a crime the opportunity "to be confronted with the witnesses against

42. For a discussion of fourth amendment issues regarding material witness statutes, see *infra* notes 47-72 and accompanying text.

43. For a discussion of fifth amendment issues regarding material witness statutes, see *supra* notes 30-35 and *infra* notes 82-100 and accompanying text.

44. For a discussion of eighth amendment issues regarding material witness statutes, see *infra* notes 73-78 and accompanying text.

45. See, e.g., *White II*, 892 F.2d at 464 (raising issues of eighth and fourteenth amendment violations); *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971) (raising issues of fourth amendment violations as to probable cause); *Class Action Application for Habeas Corpus*, 612 F. Supp. 940 (W.D. Tex. 1985) (raising sixth amendment right to counsel claim); *United States v. Feingold*, 416 F. Supp. 627 (E.D.N.Y. 1976) (alleging fourth amendment violations).

46. For a discussion of cases in which such complaints of due process and other constitutional violations were raised, see *infra* notes 82-107, 109-27 and accompanying text.

47. Courts are often statutorily authorized to restrict a material witness' liberty. For a discussion of the federal material witness provisions, see *supra* note 26. For a discussion of the Tennessee material witness provisions, see *supra* note 29 and *infra* notes 183-98 and accompanying text; see also *supra* notes 25, 37, 39 and *infra* notes 199, 239 and accompanying text for examples of state statutes providing for the detention of material witnesses.

him.”⁴⁸ In *Stein v. New York*,⁴⁹ the power to authorize the arrest and detention of a material witness was recognized by the United States Supreme Court when it stated, “the duty to disclose knowledge of crime . . . is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness.”⁵⁰

Procedurally, however, before a witness can be arrested⁵¹ and subsequently detained, the requirement of probable cause must be satisfied. The two elements of probable cause with respect to material witness incarceration are: (1) the determination that the testimony of the witness is in fact material to the case, and (2) evidence that the appearance of the witness will be impracticable to secure.⁵² If both criteria are met, the witness may then be arrested and detained subject to the conditions of release provided by the statute.⁵³

Many state material witness provisions are similar to the federal provisions in that the criteria described above must be presented to the court or presiding judicial officer in a sworn statement or affidavit usually set forth by either the arresting officer or the prosecutor.⁵⁴ The determination of whether the probable cause requirement has been met is then left to the presiding judicial officer.⁵⁵ Those challenges brought under the fourth amendment have been most successful where a judicial officer has authorized the arrest or detention of a witness without having made the necessary inquiries to support a finding of probable cause.⁵⁶

48. U.S. CONST. amend. VI. The sixth amendment reads as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI (emphasis added).

49. 346 U.S. 156 (1953).

50. *Id.* at 184.

51. For a discussion of the probable cause requirement of arresting a witness, see *supra* notes 47-50 and *infra* notes 52-72 and accompanying text.

52. See, e.g., 18 U.S.C. §§ 3142, 3144 (1988); HAW. REV. STAT. § 835-2 (1985); IOWA CODE § 804.23 (1979); TENN. CODE ANN. § 40-11-110 (1990). These requirements are found in virtually all material witness legislation. They form the basis for arresting a witness and imposing conditions on his liberty. For the text of various state statutes, see *supra* notes 25, 37, 39 and *infra* notes 199 & 239; see also *supra* note 26 for the text of the federal provisions.

53. For an example of potential release conditions in the federal material witness provisions, see *supra* note 26.

54. For the text of both state and federal statutes providing for the requirement of an affidavit setting forth that the witness' testimony is material and that it will be impracticable to secure his presence at trial without some condition or restriction placed on his liberty, see *supra* notes 3 & 26.

55. For the text of both state and federal material witness provisions, see *supra* notes 3, 25, 26 and *infra* notes 199 & 239.

56. The fourth amendment reads as follows:

In *Bacon v. United States*,⁵⁷ through a petition for a writ of habeas corpus, the petitioner claimed that her arrest and detention, pursuant to a material witness arrest warrant, were invalid because the warrant lacked any assessment of the surrounding "circumstances from which the judicial officer could find probable cause."⁵⁸ Specifically, it had not been shown to the judicial officer "(1) 'that the testimony of [the witness was] material' and (2) 'that it [might] become impracticable to secure his presence by subpoena.'"⁵⁹ In evaluating the requirement of probable cause, the court stated that under the "Fourth Amendment, the essential element is the physical restraint placed upon the person."⁶⁰ Based on this determination, the *Bacon* court proceeded to analyze whether a showing of probable cause was necessarily required in all cases involving the detention of a material witness.⁶¹ The court noted that "a requirement of probable cause . . . does not conflict with any legitimate public interest,"⁶² and concluded that the judicial officer issuing a material wit-

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. For a discussion of cases in which petitioners have raised successful claims of fourth amendment violations, see *infra* notes 57-72 and accompanying text.

57. 449 F.2d 933 (9th Cir. 1971). For a further discussion of *Bacon*, see *infra* notes 58-65 and accompanying text.

58. *Bacon*, 449 F.2d at 943. Bacon's claims arose from the following facts. Based on an affidavit sworn out by the United States Attorney for the Western District of Washington, the district court issued an arrest warrant which authorized Bacon's arrest and transportation to Seattle. *Id.* at 934-35. Bacon was to remain in the United States Marshall's custody unless she posted a bail of \$100,000. *Id.* The affidavit claimed that Bacon knew material facts which the United States Attorney wanted to be presented to a grand jury, and that "a subpoena would be ineffective in securing her presence because she would flee the jurisdiction . . . to avoid giving testimony." *Id.* at 934.

Bacon's primary claim was not that the court lacked the authority to subpoena witnesses to testify in front of the grand jury, but rather that "the government had no power to assure the attendance of grand jury witnesses by arrest and detention *before* disobedience of a subpoena." *Id.* at 936 (emphasis added).

59. *Id.* at 943 (quoting 18 U.S.C. § 3149 (1970) (repealed 1984)). In determining what constituted probable cause, the court relied on Rule 46(b) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3149 (1970) (repealed 1984), which has since been replaced by 18 U.S.C. § 3144 (1988). *Bacon*, 449 F.2d at 942-43. The court stated that "sufficient facts must be shown to give the judicial officer probable cause to believe that it may be impracticable to secure the presence of the witness by subpoena. Mere assertion will not do." *Id.* at 943. The court indicated that to issue a valid arrest warrant, a court would have to be presented with evidence which would specifically support a finding of probable cause, such as the surrounding circumstances of the witness' situation or the willingness or unwillingness of the witness to testify. *Id.*

60. *Bacon*, 449 F.2d at 942.

61. *Id.* at 941-43.

62. *Id.* at 942.

ness warrant must have "probable cause to believe that it may be impracticable to secure the presence of the witness by subpoena. Mere assertion will not do."⁶³ Recognizing that the "arrest and detention of a material witness is as much an invasion of the security of her person as if she had been arrested on a criminal charge,"⁶⁴ the court ultimately quashed the arrest warrant and the witness was released.⁶⁵

Relying on *Bacon*, the United States District Court for the Eastern District of New York, in *United States v. Feingold*,⁶⁶ restated the requirements of probable cause necessary to issue a valid material witness arrest warrant.⁶⁷ The court applied the probable cause criteria to Feingold's motion to quash the arrest warrant issued against him.⁶⁸ In its analysis, the court focused on Feingold's "unwillingness" to appear before the court as a witness.⁶⁹ The determination that Feingold was unwilling to appear had been based on an affidavit submitted by an I.R.S. agent describing several "unsuccessful attempts to serve Feingold."⁷⁰ Having concluded that the probable cause element had been met, the court denied the motion to quash the warrant.⁷¹ The court, however, noted that, pursuant to the federal provisions, Feingold would be "entitled to present additional information to the appropriate judicial officer to arrange suitable conditions for his release."⁷²

63. *Id.* at 943. In so holding, the court found Bacon's arrest warrant invalid. *Id.* at 945.

64. *Id.* at 942.

65. *Id.* at 945.

66. 416 F. Supp. 627 (E.D.N.Y. 1976).

67. *Id.* at 628. These requirements were set forth in the former federal material witness provision which read in full:

If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 3146 [18 U.S.C. § 3146]. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

18 U.S.C. § 3149 (1970) (repealed 1984) (current version at 18 U.S.C. § 3144 (1988)) (emphasis added).

68. *Feingold*, 416 F. Supp. at 628.

69. *Id.* at 629.

70. *Id.* Both the former federal material witness provision in effect when Feingold was arrested and detained, and the present material witness provision, require that an affidavit must be filed which shows that the testimony of the witness is both "material" and "impracticable to secure." 18 U.S.C. § 3144 (1988); 18 U.S.C. § 3149 (1970) (repealed 1984).

71. *Feingold*, 416 F. Supp. at 629. Responding to Feingold's allegation that the probable cause element had not been met because he had not ever "actually disobeyed a subpoena," the court held that such a showing was not necessary to support the second prong of the probable cause test. *Id.* at 628.

72. *Id.* at 629. Feingold would most likely have been able to procure his

2. Allegations of Eighth Amendment Violations

The eighth amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁷³ Constitutional challenges pursuant to the eighth amendment are supported by the fact that, the requirement of bail itself is generally considered the most severe condition to impose upon a witness.⁷⁴ For example, both the federal statute, and the Tennessee statute under which Clyde White was detained, provide for the setting of bail as a last option.⁷⁵ A material witness may move, however, for the reduction of bail on the grounds that the bail is excessive and thus violative of the eighth amendment.⁷⁶ Such motions are usually raised by counsel and are most prevalent in cases involving indigent witnesses.⁷⁷ In addition, a witness can directly challenge his detention on the grounds that it is cruel and unusual if, for example, he has been held for an unreasonable length of time.⁷⁸

It should be noted that in *White II*,⁷⁹ White did allege eighth amendment violations.⁸⁰ The Sixth Circuit, however, quickly dismissed

release in accordance with the provisions of § 3149 of the Bail Reform Act of 1966. 18 U.S.C. § 3149 (1970) (repealed 1984) (current version at 18 U.S.C. § 3144 (1988)). This statute mandated the release of any witness being detained as a result of his inability to post the bond set by the court provided that the government could "adequately" document his testimony by deposition. *Id.* (statute read, "No material witness shall be detained because of an inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition . . ."). Not all state material witness provisions, however, provide similar treatment or protection. For example, the Tennessee provision simply states that, in the situation where a witness cannot afford bail, the court, "may order his release if he has been detained for an unreasonable length of time, and may modify at any time the requirement as to bail." TENN. CODE ANN. § 40-11-110 (1990) (emphasis added). Because these provisions are discretionary they provide no guarantees that an indigent witness will be released. For the text of other state statutes, see *supra* notes 25, 39 and *infra* notes 199 & 239.

73. U.S. CONST. amend. VIII.

74. See TENN. CODE ANN. § 40-11-116 (1990).

75. 18 U.S.C. § 3142(c)(1)(B)(xii) (1988). This statute further states that: "The judicial officer may not impose a financial condition that results in the pretrial detention of a person." 18 U.S.C. § 3142(c)(2). See TENN. CODE ANN. § 40-11-116 (1990) (listing "deposit of bail" as last potential condition imposed upon witness' release).

76. See, e.g., *People ex rel. Richards v. Warden of City Prison*, 277 A.D. 87, 98 N.Y.S.2d 173 (1950) (court reduced \$100,000 bail to \$10,000 pursuant to state constitutional provision similar to eighth amendment).

77. For a discussion of the eighth amendment and claims of excessive bail, particularly in the state system, see Comment, *supra* note 39, at 511.

78. See *White II*, 892 F.2d at 460 (wherein White alleged his extended incarceration amounted to "cruel and inhumane treatment").

79. 892 F.2d 457 (6th Cir. 1989). For an explanation of what is referred to as *White I* and *White II*, see *supra* note 1.

80. *White II*, 892 F.2d at 464. For the text of the eighth amendment, see text accompanying *supra* note 73.

White's claim without rendering substantive support for its decision.⁸¹

3. *The Due Process Requirements of the Fifth and Fourteenth Amendments*

a. The Liberty Interest

In those cases that offer a comprehensive evaluation of material witness statutes, the courts have determined which procedural due process protections a material witness is guaranteed.⁸² The due process clause of the fifth amendment applicable to federal proceedings provides that "[n]o person shall . . . be . . . deprived of life, liberty, or property, without due process of law."⁸³ Due process is also guaranteed in state proceedings pursuant to the fourteenth amendment.⁸⁴ Issues such as a witness' liberty interests, his right to be heard, and his right to be represented by counsel have been raised, often successfully, by detained material witnesses in both federal and state proceedings.⁸⁵ In evaluating the administration of material witness legislation, courts have analyzed what process is due in the treatment of material witnesses and also which rights guaranteed by the fifth amendment due process clause are incorporated in the fourteenth amendment, and therefore applicable to state proceedings.⁸⁶ This analysis is especially crucial when a witness'

81. *White II*, 892 F.2d at 464.

82. See *Morrissey v. Brewer*, 408 U.S. 471 (1972) (evaluating minimum due process requirements in civil proceeding); *United States v. Eufracio-Torres*, 890 F.2d 266 (10th Cir. 1989) (court balanced defendant's sixth amendment rights against witness' fifth amendment due process rights); *Application of Cochran*, 434 F. Supp. 1207 (D. Neb. 1977) (reviewing due process concerns upon seizure of material witnesses). For a discussion of *Eufracio-Torres*, see *infra* notes 104-07, 135-37 and accompanying text.

83. U.S. CONST. amend V. For the text of the fifth amendment, see *supra* note 30.

84. U.S. CONST. amend. XIV. The fourteenth amendment, pertaining to the requirement of due process in the state systems, reads in pertinent part: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

85. See, e.g., *Cochran*, 434 F. Supp. 1207 (reviewing what process is due when material witnesses are seized); see also *United States v. Finkelstein*, No. 89 Cr. 0009 (S.D.N.Y. April 17, 1989) (LEXIS, Genfed library, Courts file) (recognizing that prolonged detention raises "humanitarian, if not due process considerations"); *United States v. Lehder-Rivas*, No. 81-82-Cr-J-12 (M.D. Fla. Sept. 18, 1987) (LEXIS, Genfed library, Courts file) (federal material witness statute "clearly recognizes that the rights of the material witness are to be considered whenever an individual is arrested"). For a discussion of *Cochran* in relation to the assistance of counsel and due process, see *infra* notes 238-41 and accompanying text.

86. For a discussion of due process in state material witness proceedings, see *Cochran*, 434 F. Supp. 1207. For a discussion of *Cochran*, see *infra* notes 93-100, 238-41 and accompanying text.

liberty and freedom are to be restrained or removed indefinitely by the court in the interest of securing a criminal defendant a fair trial.

The United States Supreme Court, in *Morrissey v. Brewer*,⁸⁷ set forth a general analysis to determine what process was due where the petitioners had challenged the revocation of their parole as a restraint on their liberty.⁸⁸ In a comprehensive evaluation of the requirements of due process, the Court stated that to determine "[w]hether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'"⁸⁹ Continuing, the Court recognized that "[t]he question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."⁹⁰ Holding that the petitioners were entitled to the minimum requirements of due process,⁹¹ the Court concluded that "[b]y whatever name . . . liberty is valuable and must be seen as within the protection of the Fourteenth Amendment."⁹²

In *Application of Cochran*,⁹³ the United States District Court for the

87. 408 U.S. 471 (1972).

88. *Id.* at 488-89. The Court stated in *Morrissey* that the "minimum requirements of due process" include the following:

(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id. at 489. However, the Court did not "decide the question whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent." *Id.* (footnote omitted). Four years later, in *Mathews v. Eldridge*, the Supreme Court relied on its decision in *Morrissey* wherein it stated that "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." 424 U.S. 319, 334 (1976) (quoting *Morrissey*, 408 U.S. at 481). Based in part on this premise, the Court set forth "three distinct factors" required by due process. *Id.* at 335. For a discussion of *Mathews* and the factors set forth therein, see *infra* note 99 and accompanying text.

89. *Morrissey*, 408 U.S. at 481 (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). For a discussion of Justice Frankfurter's opinion on the right to be heard, see *infra* note 137 and accompanying text.

90. *Morrissey*, 408 U.S. at 481 (citing *Fuentes v. Shevin*, 407 U.S. 67 (1972)).

91. For a discussion of *Application of Cochran* applying the due process analysis set forth in *Morrissey* to a material witness statute, see *supra* notes 93-100, 238-41 and accompanying text.

92. *Morrissey*, 408 U.S. at 482. In his concurring opinion in *Morrissey*, Justice Brennan, although agreeing with the Court in its evaluation of the due process clause, argued that along with other due process rights, a witness also has a right to the assistance of counsel. *Id.* at 491 (Brennan, J., concurring).

93. 434 F. Supp. 1207 (D. Neb. 1977).

District of Nebraska reviewed the rights of a witness detained pursuant to the Nebraska material witness provision,⁹⁴ and held that "due process protections do attach whenever the state physically seizes a person and then commits him to complete custodial detention for an extended period of time."⁹⁵ The *Cochran* court, in evaluating the petitioners' liberty interests, applied the minimum due process analysis set forth by the Supreme Court in *Morrissey*.⁹⁶ The court went on to hold that "each of the six procedural safeguards specified in *Morrissey* is applicable to the [material witness] cases."⁹⁷ The *Cochran* court listed these procedural safeguards as follows:

1. Written notice of the allegations upon which the state relied for its claim of a right to require a recognizance or detention and of the time and place of the hearing on those allegations;
2. Disclosure at a hearing of the evidence in support of the state's claim;
3. An opportunity to be heard in person and to present witnesses and documentary evidence;
4. To the effect that it is practicable, the right to confront and cross-examine witnesses;
5. A hearing before a magistrate or other judicial officer; and
6. A written statement by the decision maker as to the evi-

94. For the text of the Nebraska material witness provisions, see *infra* note 239.

95. *Cochran*, 434 F. Supp. at 1212. The court in *Cochran* stated that, although the fourth amendment requirement of probable cause has been applied to the seizure and arrest of material witnesses, the issue of whether the "Due Process Clause of the Fourteenth Amendment applies to the detention of material witnesses has not been considered by the Supreme Court of the United States." *Id.* Hence, the court examined "analogous situations" in which the liberty of a person has been restrained and the due process protections have attached. *Id.* at 1212-13. The *Cochran* court concluded that the petitioners' due process rights had been violated because they were being held without adequate notice as to the state's basis for authorizing their detention. *Id.* at 1216. Furthermore, the court concluded that the witnesses had lacked adequate representation, a "crucial element of due process." *Id.* at 1214.

The *Cochran* court noted Supreme Court cases involving due process rights of petitioners in civil proceedings. *Id.* at 1212 n.11 (citing *In re Gault*, 387 U.S. 1, 30-31 (1957)) (due process protection in juvenile proceedings); *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975) (petitioner's "constitutional right to freedom" violated upon involuntary confinement to mental hospital)). For references to civil cases in which due process protections have been held to be applicable, see, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (addressing issue of due process requirements in context of revocation of parole). For a discussion of the requirements of due process according to the Supreme Court in both *Mathews* and *Morrissey*, see *supra* note 88 and accompanying text.

96. *Cochran*, 434 F. Supp. at 1213-15. For the factors set forth by the Supreme Court in *Morrissey*, see *supra* note 88 and accompanying text.

97. *Cochran*, 434 F. Supp. at 1213.

dence relied upon and the reasons for any adverse decision.⁹⁸

The court's conclusion that these factors were to be applied to the arrest and detention of material witnesses stemmed from three due process considerations: (1) the witness' liberty interest; (2) the "risk of an erroneous deprivation of such interest"; and (3) the procedural burdens on the state in light of its interest in "securing essential testimony in criminal trials."⁹⁹ Weighing these competing interests, the *Cochran* court found that, due to the absence of due process safeguards, the petitioner had been unconstitutionally incarcerated.¹⁰⁰

b. The Balancing Test

Other courts have emphasized and attempted to resolve the conflict between the rights of the witness in maintaining his unrestricted freedom and those of the defendant in maintaining his right to cross-examine the witness.¹⁰¹ On the one hand, the liberty interests of the material witness may be at stake, especially if the witness is unable to post bail and is consequently incarcerated pending the defendant's trial.¹⁰² Conversely, the defendant's rights under the sixth amendment may also be jeopardized if the witness is released and consequently fails

98. *Id.* at 1214. The *Cochran* court adapted its six factor test from the test applied by the Supreme Court in *Morrissey v. Brewer*, 424 U.S. 471, 489 (1976).

99. *Id.* at 1213-14. These three factors were also relied upon by the court in *Class Action Application for Habeas Corpus*, 612 F. Supp. 940 (W.D. Tex. 1985), to support its argument that material witnesses detained for purposes of preserving their testimony for trial retained due process rights including the right to the assistance of counsel. See *infra* notes 131-34. The three factors used by the court in *Class Action*, relied on by the court in *Cochran* to establish its due process argument, and originally set forth in *Mathews v. Eldridge* are as follows:

First, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews, 424 U.S. at 335.

100. *Cochran*, 434 F. Supp. at 1216. The *Cochran* court, in holding that the petitioner's due process rights had been violated, stated that the petitioner had neither received written notice of the allegations against him nor had he been given any written notice of the reasons for the "adverse decisions" upon which his detention was based. *Id.* The court also raised the due process issue in relation to the petitioner's right to the assistance of counsel. *Id.* at 1214-15.

101. For a discussion of a decision by the United States Court of Appeals for the Tenth Circuit which addressed this conflict, see *infra* notes 104-07, 135-37 and accompanying text.

102. See, e.g., *White II*, 892 F.2d 457 (White remained incarcerated for 288 days because he could not afford bail). For a discussion of earlier cases dealing with the prolonged detention of material witnesses and the problems of remedying such situations, see Carlson, *supra* note 39; Comment, *supra* note 39.

to appear and testify at the defendant's trial.¹⁰³

In *United States v. Eufracio-Torres*,¹⁰⁴ the United States Court of Appeals for the Tenth Circuit, discussing alternatives to a witness' prolonged detention, emphasized the "clash between the defendant's sixth amendment rights to confrontation and the witnesses' fifth amendment rights to due process."¹⁰⁵ Within one month of the witnesses' detention, the court, concerned with the witnesses' unnecessarily prolonged detention, granted a motion by the government to depose the witnesses.¹⁰⁶ The Tenth Circuit, in response to the defendant's challenge regarding the use of the depositions at trial, weighed the interests of both parties and stated that, "the balance tips toward the fifth amendment interests of the witnesses, and the government was reasonable in moving to depose and release the witnesses."¹⁰⁷

103. See *United States v. Guadian-Salazar*, 824 F.2d 344, 347 (5th Cir. 1987) (conviction reversed as deprivation of sixth amendment right to confront witnesses was "fatally prejudicial" due to inconsistency between deposition and earlier statements). For a discussion of a defendant's sixth amendment rights in a criminal proceeding, see *supra* note 16, 48-50 and accompanying text.

104. 890 F.2d 266 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1306 (1990).

105. *Id.* at 269. The facts of this case are not uncommon. The defendant was arrested for transporting illegal aliens into the United States. *Id.* at 267. The seven passengers were detained as material witnesses in accordance with the federal material witness statute. *Id.*

106. *Id.* at 268. The defendant opposed the government's motion to release the witnesses following the deposition procedures. *Id.* The defendant claimed that "the government had failed to demonstrate 'exceptional circumstances' warranting depositions because the government failed to show that the witnesses would not appear at trial if released unconditionally." *Id.* (quoting Appellee's Brief at 4). The court, however, found that it was not error for the trial court to have granted the government's motion to have the witnesses' depositions secured prior to their release. *Id.* at 271. The court reached this conclusion by reviewing the witnesses' fifth amendment due process rights along with the defendant's sixth amendment right "to be confronted with the witnesses against him." *Id.* at 268-71. The court resolved this conflict of interest in favor of the witnesses' procedural due process rights. *Id.* at 271.

Furthermore, before the witnesses were released they were served with subpoenas, and each witness indicated that he would return to the United States to testify at the defendant's trial. *Id.* at 268. At trial, the government filed a "Notice of Intention to Use [the witnesses'] Depositions." *Id.*

107. *Id.* at 270 (quoting unreported district court opinion). At issue were the rights of seven witnesses and one defendant. Balancing these interests, the court stated:

On the one hand, the witnesses have a strong constitutional interest in not being detained when charged with no crimes. Significantly, the defendant, who was charged with a crime, was released on bond, whereas the witnesses, who were not charged—a circumstance not atypical of illegal transportation of aliens cases—were detained for more than six weeks. On the other hand, the defendant has an interest in confrontation at trial. Although the deposition testimony did infringe on this interest, the depositions were trustworthy and allowed the defendant to challenge the witnesses' statements. The witnesses were told that they could be criminally charged if they lied. The defendant, through counsel, was afforded the opportunity to cross-examine the witnesses during

c. Due Process and the Right to Be Heard

i. The History of the Supreme Court's Analysis Regarding the Necessity of Effective Representation

The constitutionality of material witness provisions has been challenged with respect to the lack of effective representation and the corresponding right to be heard in a meaningful manner.¹⁰⁸ The issue of court-appointed counsel as a necessary requirement of due process has been discussed at length by the United States Supreme Court with respect to indigent criminal defendants.¹⁰⁹ In the landmark case of *Gideon v. Wainwright*,¹¹⁰ the Supreme Court faced the issue of whether an indigent criminal defendant had the right to appointed counsel under the fourteenth amendment.¹¹¹ In reviewing whether the fourteenth amendment incorporated the sixth amendment right to counsel, the Court described the right to counsel as "fundamental" and stated that "any

the depositions. Further, the depositions were postponed until the defendant could travel to Kansas City to be present.

Id. (quoting unreported district court opinion).

108. See Class Action Application for Habeas Corpus, 612 F. Supp. 940 (W.D. Tex. 1985); see also *infra* notes 109-27, 222-41 and accompanying text, discussing the relationship between the due process clause and the right to effective representation by counsel.

109. See *Scott v. Illinois*, 440 U.S. 367 (1979) (actual imprisonment and constitutional right to counsel); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (counsel required if defendant suffers incarceration); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (discussing right to counsel under fourteenth amendment as applicable to state proceedings).

110. 372 U.S. 335 (1963). For a discussion of the Court's analysis in *Gideon*, see *infra* notes 111-13 and accompanying text.

111. *Id.* at 341-45. In *Gideon*, the Court reviewed its decision in *Betts v. Brady*, 316 U.S. 455 (1942), wherein an indigent defendant challenged his state conviction as violative of the fourteenth amendment and due process because he had been denied the assistance of counsel. *Gideon*, 372 U.S. at 338-39. In *Betts*, the Court concluded that

due process [was] "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights" [and] . . . held that refusal to appoint counsel under the particular facts and circumstances . . . w[as] not so "offensive to the common and fundamental ideas of fairness" as to amount to a denial of due process.

Gideon, 372 U.S. at 339 (quoting *Betts*, 319 U.S. at 462, 473). The Court in *Betts*, after a review of the judicial history of the states, had determined that the "appointment of counsel [was] not a fundamental right, essential to a fair trial." *Betts*, 316 U.S. at 471. The *Gideon* Court did not follow this line of reasoning and instead held that the sixth amendment right to counsel was applicable to the states through the fourteenth amendment because the right to counsel was in fact fundamental. 372 U.S. at 344-45. In so holding, the Court stated:

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Id. at 344.

person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”¹¹² Because “a provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment,” it necessarily followed that the right to appointed counsel should be constitutionally guaranteed in state criminal proceedings.¹¹³

Almost ten years later, in *Argersinger v. Hamlin*,¹¹⁴ the Court expanded on its earlier holding in *Gideon* and held that “no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”¹¹⁵ The fact that incarceration activated the constitutional guarantee of representation manifests the Court’s belief that the destruction of one’s physical liberty triggers compelling due process interests. In 1979, in *Scott v. Illinois*,¹¹⁶ the Supreme Court “resolve[d] a conflict among state and lower federal courts regarding the proper application of . . . [its] decision in *Argersinger v. Hamlin*.”¹¹⁷ The Court explained its holding in *Argersinger* as follows:

[W]e believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. . . . We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.¹¹⁸

In *In re Gault* the Court relied on this premise in deciding whether there existed a corresponding right to counsel in certain civil con-

112. *Gideon*, 372 U.S. at 344.

113. *Id.* at 342 (quoting *Betts*, 316 U.S. at 465). In *Gideon*, the Court quoted *Gorsjean v. American Press Co.*, 297 U.S. 233, 243-44 (1936), wherein the Court had stated:

We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.

Gideon, 372 U.S. at 343 (quoting *Gorsjean*, 297 U.S. at 243-44).

114. 407 U.S. 25 (1972).

115. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (emphasis added). For a discussion of the Court’s decision in *Argersinger* and later cases, see Duke, *The Right to Appointed Counsel: Argersinger and Beyond*, 12 AM. CRIM. L. REV. 601 (1975).

116. 440 U.S. 367 (1979).

117. *Scott*, 440 U.S. at 373-74.

118. *Id.*

texts.¹¹⁹ The Court stated that where a "juvenile's freedom is curtailed" the due process clause of the fourteenth amendment mandates that "the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child."¹²⁰ Similarly, in *Lassiter v. Department of Social Services*,¹²¹ the petitioner, who was subject to a civil parental termination hearing, argued that she was entitled to the assistance of appointed counsel pursuant to the due process clause of the fourteenth amendment.¹²² Relying on the decisions in *Gideon*,¹²³ *Argersinger*,¹²⁴ *In re Gault*,¹²⁵ and *Scott*,¹²⁶ the Supreme Court stated:

In sum, the Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.¹²⁷

119. 387 U.S. 1 (1967).

120. *Id.* at 41.

121. 452 U.S. 18 (1981); see also *Vitek v. Jones*, 445 U.S. 480 (1980) (proposed transfer to state mental hospital entitled prisoner to representation by counsel).

122. *Lassiter*, 452 U.S. at 24. The Court in *Lassiter* held that in some circumstances appointed counsel is required in parental termination hearings, but that "the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings [is] to be answered in the first instance by the trial court, subject, of course, to appellate review." *Id.* at 32.

123. *Gideon v. Wainwright*, 372 U.S. 335 (1963). For a discussion of *Gideon*, see *supra* notes 110-13 and accompanying text.

124. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). For a discussion of *Argersinger*, see *supra* notes 114-18 and accompanying text.

125. *In re Gault*, 387 U.S. 1 (1967). For a discussion of *In Re Gault*, see *supra* notes 119-20 and accompanying text.

126. *Scott v. Illinois*, 440 U.S. 367 (1979). For a discussion of *Scott*, see *supra* notes 116-18 and accompanying text.

127. *Lassiter*, 452 U.S. at 26-27. The United States District Court for the Northern District of Ohio relied on *Lassiter* in deciding whether due process required counsel in a "civil" proceeding held in a domestic relations court. *Johnson v. Zurz*, 596 F. Supp. 39, 45 (N.D. Ohio 1984). The *Johnson* court held:

[W]here an indigent is ordered to appear and show cause why he should not be held in contempt of court for failure to pay child support and is subject to incarceration, due process requires that the indigent be informed of his right to appointed counsel and, after inquiry and upon request, such counsel be appointed before the indigent appears to answer the show cause order.

Id. at 46. In so holding, the court considered the interests at stake and stated that: "Physical liberty is and has been of vital interest to the people of the United States from the time of our founding fathers. That this liberty interest

Since these decisions, the actual deprivation of liberty in either the criminal or civil context has remained the central focus in determining whether the sixth amendment right to counsel attaches.

ii. The Bail Reform Act of 1984

Section 3142 of the Bail Reform Act provides for the assistance of counsel at a witness' detention hearing, during which the court determines what conditions, if any, should be imposed upon the witness to assure his attendance at trial.¹²⁸ This section also requires that if the witness is unable to afford an attorney, one shall be appointed for him by the court.¹²⁹ Often it is this appointed counsel who will procure the

may only be taken from an individual with due process of law is fundamental to our system of government." *Id.*

The crucial difference between the plaintiffs' circumstances in *Lassiter* and *Johnson* was that the "the actual possibility of incarceration" existed in *Johnson* where no such possibility existed in *Lassiter*. *Johnson*, 596 F. Supp. at 45-46. The Court in *Lassiter* recognized that in some instances due process required the appointment of counsel in a parental termination hearing where "the parent's interests were at their strongest, the State's interests at their weakest, and the risks of error were at their peak . . ." *Lassiter*, 452 U.S. at 31. Yet, the Court recognized "that the Constitution [would not] require[] the appointment of counsel in every parental termination proceeding." *Id.* The Court therefore concluded that the trial court must review each case individually, taking into consideration those factors enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1975), to determine whether due process would require appointed representation. *Lassiter*, 452 U.S. at 27, 31-32 (citing *Mathews*, 424 U.S. at 335). The plaintiff in *Johnson*, however, was "faced with incarceration" and therefore the "liberty interests involved far outweigh[ed] the interests of the state." *Johnson*, 596 F. Supp. at 46. In this situation, regardless of whether the proceeding is civil or criminal, the right to counsel attaches. *Id.*

For a further discussion of *Mathews*, see *supra* note 99 and accompanying text. The *Mathews* factors, discussed above, were listed as follows by the Supreme Court:

First, the private interests that will be affected by the official action; second, the risk of erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews*, 424 U.S. at 335.

128. 18 U.S.C. § 3142(f) (1988).

129. *Id.* See, e.g., *United States v. Rivera*, 859 F.2d 1204, 1205 (4th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989). In *Rivera*, counsel was appointed for detained material witnesses. Because counsel had been appointed for the witnesses, they were able to move for an order that their depositions be taken pursuant to 18 U.S.C. § 3144 and Rule 15 of the Federal Rules of Criminal Procedure. *Id.* at 1205. Furthermore, § 3144 states not only that "[n]o material witness may be detained because of inability to comply with any conditions of release if the testimony of such witness can adequately be secured by deposition . . .," but also that a witness' detention may only "be delayed for a reasonable period of time until the deposition of the witness can be taken." 18 U.S.C. § 3144. Rule 15(a) of the Federal Rules of Criminal Procedure authorizes the taking of a witness' deposition under particular circumstances. For a discussion

release of the witness by moving either to have the witness deposed or the bail reduced in light of the witness' circumstances.¹³⁰

In 1985, the issue of mandatory representation pursuant to the Bail Reform Act was first discussed in *Class Action Application for Habeas Corpus*.¹³¹ The question before the United States District Court for the Western District of Texas was whether material witnesses, then being held pursuant to section 3144 of the Bail Reform Act, were "entitled to representation by counsel at the time that the determination to hold them as material witnesses [was] made and during the time of their incarceration."¹³² As section 3144 of the Bail Reform Act had only recently been enacted, the court addressed the changes instituted by the new legislation.¹³³ Recognizing that section 3142(f) specifically requires the appointment of counsel for those who cannot afford one, the court stated that not only is the appointment of counsel mandated by section 3142(f) of the Bail Reform Act, but also "that appointment of counsel to represent material witnesses is required by the Fifth Amendment to the Constitution."¹³⁴

The Tenth Circuit in *United States v. Eufrazio-Torres* consistently made reference to the witnesses' "right to be heard," stating that this was "[t]he fundamental requirement of due process."¹³⁵ Recognizing

of Rule 15(a) of the Federal Rules of Criminal Procedure, see *infra* text accompanying note 146.

130. See, e.g., *United States v. Finkielstain*, No. 89 Cr. 0009 (S.D.N.Y. April 17, 1989) (LEXIS, Genfed library, Courts file); *Eufrazio-Torres*, 890 F.2d at 269; see also *Class Action Application for Habeas Corpus*, 612 F. Supp. 940 (W.D. Tex. 1985).

131. 612 F. Supp. 940 (W.D. Tex. 1985).

132. *Id.* at 942. Although the respondents agreed with the petitioners that § 3144 of the Bail Reform Act "provide[s] for the appointment of counsel for persons arrested as material witnesses," they "remain[ed] steadfast in their contention that they [were] unable to provide the relief sought by the Petitioners." *Id.* at 942. The respondents' argument was based on the pretense that it was the duty of the court to provide the relief sought by the incarcerated material witnesses. *Id.*

133. *Class Action*, 612 F. Supp. at 942-43. The changes in the new material witness statutes are as follows: "Section 3144 unambiguously provides that material witnesses are to be treated in accordance with Title 18, United States Code, Section 3142 which addresses the release of defendants prior to trial [and] Section 3144 explicitly grants authority to a judicial officer to order the arrest of a person as a material witness." *Id.* at 942 (citing Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 3182, 3211-12).

134. *Id.* at 943-44 (emphasis added). For a discussion of the protection counsel can provide for a witness detained pursuant to a material witness statute, see *infra* notes 222-41 and accompanying text.

135. *Eufrazio-Torres*, 890 F.2d 266, 270 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1306 (1990) (citing *Parratt v. Taylor*, 451 U.S. 527, 540 (1981)). For a further discussion of the right to counsel, see *infra* notes 222-41 and accompanying text. It should also be noted that one of the changes made to the federal material witness provisions, as part of the Bail Reform Act of 1984, was the additional protection of the right to be represented by counsel. 18 U.S.C. § 3142(f)

that the detention of a material witness was considered a civil proceeding and therefore the sixth amendment right to counsel would not normally attach,¹³⁶ the Tenth Circuit quoted the United States Supreme Court which stated that, "the 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.'"¹³⁷ This principle supports the conclusion that a material witness must be afforded the representation of counsel in accordance with the fifth amendment, above and beyond the requirement of representation set forth in section 3142(f).¹³⁸

Based on the authorities cited above, it is evident that a material witness faces the genuine risk of being deprived of his fifth amendment due process rights in order to ensure a criminal defendant's sixth amendment right to a fair trial. Though many witnesses may be released on their own recognizance or subject to restrictive conditions, witnesses who are incarcerated without effective representation may remain incarcerated for unreasonable lengths of time. The legislatures have provided the courts with the power to detain a material witness and have often set forth detailed procedures and options for the courts to follow.¹³⁹ If a court, however, fails to properly consider the legislature's mandates and fails to make the relevant inquiries and investigations into the witness' circumstances, an innocent witness is left with no recourse by which to free himself.¹⁴⁰

D. *The Difficulties of Remedying a Wrongful Incarceration in Both the Federal and State Systems*

1. *Remedies Available During Incarceration*

a. Writs of Habeas Corpus

Generally, a witness who has been detained pursuant to either a state or federal material witness provision will not be successful in bringing a civil action against the judicial officers responsible for his incarceration once he has been released from jail.¹⁴¹ If, however, the witness is

(1988). This section further provides that counsel will be appointed if the witness cannot afford to retain counsel on his own. *Id.*

136. *Eufrazio-Torres*, 890 F.2d at 270.

137. *Id.* (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

138. 18 U.S.C. § 3142(f) (1988). For a further discussion of the right to counsel and the corresponding due process concerns, see *supra* notes 109-27 and *infra* notes 222-41 and accompanying text.

139. For the relevant Tennessee and federal statutes, see *supra* notes 3 & 26 respectively.

140. See, e.g., *United States v. Finkelstein*, No. 89 Cr. 0009 (S.D.N.Y. April 17, 1989) (LEXIS, Genfed library, Courts file); *Application of Cochran*, 434 F. Supp. 1207 (D. Neb. 1977).

141. For a discussion of the problems surrounding the effects of judicial immunity on civil proceedings, see *infra* notes 155-61 and accompanying text.

given the opportunity and the means, he may seek a writ of habeas corpus and attack the validity of his detention while he is incarcerated.¹⁴²

Through this type of collateral attack, the witness may choose to challenge his incarceration as violative of either his fourth, fifth, eighth or fourteenth amendment rights,¹⁴³ or as part of a motion requesting that the court order a deposition proceeding.¹⁴⁴ Under these circumstances, the witness' immediate release would be the remedy sought. Yet a witness who lacks the assistance of counsel will often be left without the legal means or knowledge to initiate such an action himself. The prolonged incarceration of Clyde White manifests the problems a witness faces without adequate representation.¹⁴⁵

b. Federal Deposition Procedures for Material Witnesses

The federal rule regarding the taking of depositions in criminal cases reads as follows:

Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.¹⁴⁶

Witnesses detained pursuant to the federal material witness provi-

142. See, e.g., *Class Action Application for Habeas Corpus*, 612 F. Supp. 940; *Cochran*, 434 F. Supp. 1207 (W.D. Tex. 1985). But see *In re Rankin*, 330 Mich. 91, 47 N.W.2d 28 (1951) (writ dismissed because of witness' prior disappearance and false testimony).

143. *Class Action*, 612 F. Supp. 940 (fifth amendment due process requires appointment of counsel to all material witnesses); *Cochran*, 434 F. Supp. 1207 (through writ of habeas corpus, petitioner successfully raised claims of due process violations); *In re Rankin*, 330 Mich. 91, 47 N.W.2d 28 (contesting excessive bail); *People ex rel. Gross v. Sheriff of New York*, 277 A.D. 546, 101 N.Y.S.2d 271 (1950) (through writ of habeas corpus, petitioner contested excessive bail and unreasonable detention).

144. See, e.g., *United States v. Rivera*, 859 F.2d 1204 (4th Cir. 1988), cert. denied, 490 U.S. 1020 (1989) (after remaining in custody for three weeks, depositions ordered upon motion of counsel pursuant to 18 U.S.C. § 3144 and FED. R. Crv. P. 15(a)); *United States v. Linton*, 502 F. Supp. 878 (D. Nev. 1980) (motion pursuant to § 3149 granted ordering witness' deposition and release on personal recognizance).

145. For a discussion of White's dilemma when his request for counsel was denied, see *infra* notes 162-82 and accompanying text.

146. FED. R. CRIM. P. 15(a).

sions can generally, upon motion by counsel, secure their release if the court deems it is "in the interests of justice" to take the witness' deposition and release him from custody.¹⁴⁷ For example, in *United States v. Finkielstain*,¹⁴⁸ the court ordered that the deposition of a material witness be taken as an alternative to detention under section 3144 of the Bail Reform Act.¹⁴⁹ In reaching this decision, pursuant to Rule 15 of the Federal Rules of Criminal Procedure and section 3142 of the Bail Reform Act, the United States District Court for the Southern District of New York stated that the witness' detention "without charge for close to three months raises humanitarian, if not due process considerations."¹⁵⁰ Although it was fairly certain that the witness, if released, would return to Uruguay before the trial, thereby making it impossible to secure his attendance at a later date, the court reasoned that it was "in the interests of justice" to depose the witness rather than detain him in the United States for an indefinite period of time.¹⁵¹

Similarly, the United States District Court for the District of Nevada, in *United States v. Linton*,¹⁵² granted a witness' motion requesting that the court order his deposition and release him upon his personal recognizance.¹⁵³ In *Linton*, the court felt that because the petitioner was

147. *Id.* For a discussion of cases in which the witness' release was obtained following deposition procedures, see *infra* note 225 and accompanying text.

In determining whether to grant a motion ordering depositions, the court must consider the sixth amendment rights of the defendant. See *supra* notes 48-50. Interpreting the confrontation clause of the sixth amendment, the United States Supreme Court has held that in order to utilize a witness' deposition against a defendant in a criminal proceeding, "the government must demonstrate that it made a good faith effort using reasonable means to obtain declarant's presence at trial." *United States v. Eufrazio-Torres*, 890 F.2d 266, 269 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1306 (1990).

148. No. 89 Cr. 0009 (S.D.N.Y. April 17, 1989) (LEXIS, Genfed library, Courts file).

149. *Id.* at 2-3. For the text of § 3144 of the Bail Reform Act, which provides for material witness detention, and Rule 15(a), which provides deposition procedures, see *supra* note 26 and the text accompanying note 146, respectively.

150. *Finkielstain*, No. 89 Cr. 0009 at 2. The three months detention refers to the period of time the witness would be incarcerated if the court proceeded under the material witness provisions as opposed to ordering his deposition. There have been many cases in which the courts have, upon motion from either the prosecution, defense, or the material witness' counsel, granted approval to depose a material witness in custody so his release could be secured. See *United States v. Lehder-Rivas*, No. 81-82-Cr-J-12 (M.D. Fla. Sept. 18, 1987) (LEXIS, Genfed library, Courts file) (motion for deposition of material witness granted and conditions for release "modified to allow him to leave the United States and return to his home in South Caicos, Turks and Caicos Islands"); *United States v. Francisco-Romandia*, 503 F.2d 1020, 1021 (9th Cir. 1974), *cert. denied*, 420 U.S. 910 (1975) (release of 20 material witnesses following deposition procedures was not an "abuse of discretion").

151. *Finkielstain*, No. 89 Cr. 0009 at 2-3.

152. 502 F. Supp. 878 (D. Nev. 1980).

153. *Linton*, 502 F. Supp. at 878. The petitioner's motion was made pursuant to the former federal material witness legislation. *Id.* (citing 18 U.S.C.

presently in custody and had been incarcerated for approximately two months, "exceptional circumstances" warranted the taking of his deposition and releasing him from custody.¹⁵⁴

2. *Judicial Immunity as a Barrier to a Successful Post-Incarceration Remedy*

Beyond the constitutional issues raised by White, judicial immunity worked to secure the dismissal of White's section 1983 claim against the judicial officer and agents of the City of Chattanooga.¹⁵⁵ The doctrine of judicial immunity has been defined as: "The absolute protection from civil liability arising out of the discharge of judicial functions which every judge enjoys. Under [the] doctrine of 'judicial immunity,' a judge is not subject to liability for any act committed within the exercise of his judicial function. . . ." ¹⁵⁶ The Supreme Court has explained further that:

This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."¹⁵⁷

§ 3149 (1970) (repealed 1984) (current version at 18 U.S.C. § 3144 (1988)). Section 3149, now repealed, provided, as does today's federal material witness legislation, that "[n]o material witness shall be detained because of his inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice." 18 U.S.C. § 3149 (1970) (current version at 18 U.S.C. § 3144).

154. *Linton*, 502 F. Supp. at 879. The court ordered the petitioner's deposition to be taken and the petitioner was then released on specified conditions including limitations on his travel liberties and the requirement that petitioner notify the proper authorities if his address or phone number changed. *Id.* at 879-81. Furthermore, the court explicitly stated that although he was to give his testimony by deposition and be released from custody, he was "not excused from appearing at the trial if he [was] subpoenaed as a witness." *Id.* at 881.

155. *White II*, 892 F.2d at 461-64. In *White II*, the Sixth Circuit explicitly held that so long as the judicial officers were acting in a quasi-judicial capacity, such as setting bail, they were immune from civil liability. *Id.*

156. BLACK'S LAW DICTIONARY 848 (6th ed. 1990) (citing *C.M. Clark Ins. Agency, Inc. v. Reed*, 390 F. Supp. 1056, 1060 (D.C. Tex. 1975)).

157. *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (quoting *Scott v. Stansfield*, 3 L.R.-Ex. 220, 223 (1868), *quoted in* *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 349 (1872)). The United States Court of Appeals for the Sixth Circuit defined the doctrines of judicial immunity similarly when it stated: "Provided that they do not engage in non-judicial acts or act in the clear absence of all jurisdiction, judges presiding over courts of general jurisdiction are absolutely immune from suits for damages even if they act erroneously, corruptly or in excess of jurisdiction." *King v. Love*, 766 F.2d 962, 965 (6th Cir.), *cert. denied*, 474 U.S. 971 (1985). The court also held that "judges of courts of limited jurisdiction are absolutely immune from suits for damages if they act in excess of jurisdiction but do not act in absence of all jurisdiction." *Id.* at 967.

Quoting the United States Supreme Court, the Sixth Circuit further noted that "the scope of [a] judge's jurisdiction must be construed broadly where the issue is the immunity of the judge."¹⁵⁸

The Supreme Court has held that by enacting section 1983 Congress did not intend to "abolish the doctrine" of judicial immunity.¹⁵⁹ In addressing a section 1983 claim, the United States Court of Appeals for the Fourth Circuit explained that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established [federal] statutory or constitutional rights of which a reasonable person would have known."¹⁶⁰ Because of this immunity, a witness generally will not be able to hold a judge civilly liable for his failure to comply with statutory requirements.¹⁶¹ Hence, a witness may be left without a remedy against a judicial officer who has required that the witness post bond or has authorized the detention of the witness in a manner contrary to the appropriate statutory authority.

Police officers are also entitled to a qualified immunity from civil suits when they are performing discretionary acts. *Pierson*, 386 U.S. at 555-57 (holding "defense of good faith and probable cause" available to police officers under § 1983); see also 1 COOK & SOBIESKI, CIVIL RIGHTS ACTIONS § 2.07 (1990) (in-depth discussion of doctrine of judicial immunity and claims of civil rights violations under § 1983).

158. *King*, 766 F.2d at 965 (quoting *Stump v. Sparkman*, 435 U.S. 349, 356 (1978)). The court in *King* explained that an "act is non-judicial if it is not normally performed by a judicial officer or if the parties did not deal with the judge in his official capacity." *Id.*

159. *Pierson*, 386 U.S. at 554-55.

160. *Clark v. Link*, 855 F.2d 156, 160 (4th Cir. 1988) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

161. See *White II*, 892 F.2d 457. In *White II* it was argued that the judicial officials lacked the probable cause necessary to detain White, yet in fact he was detained for 288 days. *Id.* at 463-64. When White challenged the judicial officials' actions, his appeal was dismissed pursuant to the determination that the officials were immune from civil liability. *Id.* at 462-64.

King also exemplifies the difficulty faced by plaintiffs attempting to hold judicial officials liable for violations of civil rights. *King*, 766 F.2d 962. In *King*, Judge Love appealed a verdict awarding plaintiff both compensatory and punitive damages. *Id.* at 963. The plaintiff, King, had been seized pursuant to an arrest warrant for his failure to appear at the appropriate time before the court on a drunk driving charge. *Id.* Apparently, the individual actually stopped for driving under the influence of alcohol, W.C. Anderson, had produced King's lost license as identification and a ticket was made out in King's name. *Id.* Thus, the arrest warrant erroneously named King as the person to be arrested. *Id.*

King "offered to explain the mistake" but Judge Love disregarded this attempt to clear up the error of identification. *Id.* King was incarcerated from March 4, until March 7, 1980, pursuant to a contempt charge issued by Judge Love. *Id.* at 964. In summary, the court held that Judge Love was entitled to absolute immunity under the circumstances as reviewed; therefore, King could "not sue Judge Love for damages stemming from the March 4, 1980 incident." *Id.* at 968.

III. DISCUSSION

The facts of White's case and the Tennessee statute, from which the judicial officers obtained the authority to detain White, are discussed below. Although the Sixth Circuit's opinions give a fair amount of factual detail surrounding White's initial arrest and incarceration, neither opinion offers much insight into the specific procedures followed by the Tennessee judicial officers. For this reason, it is difficult to discern the exact procedural application of the Tennessee material witness provisions and whether the judicial officers conducted an investigation to determine White's status as a material witness as prescribed by the provisions.

A. White ex rel. Swafford v. Gerbitz

On October 11, 1984, Clyde White, a homeless man who lived on the streets of Chattanooga, Tennessee, was found "intoxicated and sleeping approximately fifteen to twenty feet from [the] body" of a man who had been stabbed and beaten to death.¹⁶² White was taken into custody by the detective investigating the case who believed that White had either committed the murder himself or witnessed the crime.¹⁶³ While being interviewed by the detective, White stated that "he did not want to be a 'snitch' and did not want to testify about the incident" ¹⁶⁴ He also informed the detective at that time that he was homeless.¹⁶⁵ White then proceeded to describe to the detective the events he had witnessed surrounding the murder.¹⁶⁶ Subsequently, White was arrested and detained as a "'state's witness' to assure his testimony at trial."¹⁶⁷

The following day, White and the person White had named as the murderer in his statement to the detective were brought before Judge

162. *White II*, 892 F.2d at 458. For another account of the facts surrounding White's arrest and detention, see *White I*, 860 F.2d 661 (6th Cir. 1988), *cert. denied*, 489 U.S. 1028 (1989).

163. *White II*, 892 F.2d at 458.

164. *Id.* at 459. Although the court noted that White had told the detective he did not want to be a "snitch," the court never addressed statements later made by White which indicated that he would voluntarily appear at Denson's trial. *Id.* In the 1988 decision arising out of this case, however, in which claims against the four prosecuting attorneys were dismissed, a more detailed account of White's detention appears. *White I*, 860 F.2d at 662-63. In the 1988 decision, the court dismissed White's action stating that White had "waived his federal cause of action when he subsequently filed a similar claim before the Tennessee Claims Commission." *Id.* at 664. In this account, it is recorded that White repeatedly assured the court that he would appear to testify at Denson's trial. *Id.* at 663. For a discussion of the 1988 opinion, see *infra* notes 169-82, 191 and accompanying text.

165. *White II*, 892 F.2d at 459.

166. *Id.*

167. *Id.*

William Cox of the Chattanooga City Court.¹⁶⁸ At this initial bond hearing Judge Cox denied White's request to be represented by an attorney.¹⁶⁹ Although White assured the court that he would appear to testify, bond was set at \$500.¹⁷⁰ Consequently, upon his failure to post bond, White was incarcerated pending a preliminary hearing scheduled for October 18, 1984.¹⁷¹ At the preliminary hearing, White, again unrepresented by counsel, requested that the court release him on his own recognizance.¹⁷² Instead, Special City Judge Russell Bean, who presided over the hearing, raised White's bond to \$1,500 and White returned to jail.¹⁷³

In February, 1985, the defense attorney representing the murder suspect inquired about White's circumstances.¹⁷⁴ At this time, the court instructed the prosecution and the defense to "work together to release [White]."¹⁷⁵ In April of 1985, White, who was still in prison, wrote to the Assistant District Attorney on the case requesting that he be released.¹⁷⁶ White, however, remained incarcerated until June 27,

168. *Id.* Denson was later charged with the murder of Smith. *Id.* The prosecution, however, eventually dropped the charges against him. *Id.*

169. *Id.*; see also *White I*, 860 F.2d at 663. In the 1989 case, the court stated that "White claims to have been told that he did not need an attorney." *White II*, 892 F.2d at 459.

170. *White I*, 860 F.2d at 663. The assurances White gave to the court were not mentioned by the Sixth Circuit in the 1989 opinion. The 1988 opinion, however, makes reference to White's statements that he would testify willingly. *Id.* In the 1988 decision, the Sixth Circuit stated:

Despite the plaintiff's assurances that he would appear, the judge set the plaintiff's bond at \$500 and, when he was unable to make bond, incarcerated him at the Hamilton County Jail until a preliminary hearing set for October 18, 1984. At the preliminary hearing, the plaintiff once again was not afforded an attorney and was not advised of his rights The judge raised the plaintiff's bond to \$1,500 and, when White again was unable to make bond, incarcerated him at the Hamilton County Jail despite his request that he be released upon his own recognizance.

Id. (emphasis added).

171. *White II*, 892 F.2d at 459.

172. *White I*, 860 F.2d at 663. The 1989 opinion states that White "request[ed] to sign his own bond." *White II*, 892 F.2d at 459. This request was denied by Judge Bean who presided over White's preliminary hearing on October 18, 1984. *Id.*

173. *White II*, 892 F.2d at 459.

174. *Id.* The court stated that Denson's attorney "inquired about White's continued incarceration, which prompted the court to instruct defense and prosecution attorneys to work together to release White." *Id.* The court continued by stating that "[t]wo weeks later, when Denson's attorney inquired about White's continued incarceration, the prosecutor told him that if he would prepare an order requesting White's release, the prosecution would present it to the court." *Id.* Nothing more is mentioned by the Sixth Circuit concerning the efforts of either party to procure White's release. White was not released until some four months later. *Id.*

175. *White I*, 860 F.2d at 663.

176. *Id.*

1985.¹⁷⁷ Following his release, White voluntarily appeared in court and was prepared to testify against the suspected murderer, Gregory Denson; however, the indictment against Denson was then dismissed at the prosecutor's request.¹⁷⁸

Clyde White later brought two actions, pursuant to section 1983 of the Civil Rights Act, protesting his extended incarceration.¹⁷⁹ The first suit was brought in federal court against the District Attorney and his assistants.¹⁸⁰ The second suit, also instituted in federal court, was brought against the City of Chattanooga and its agents and officers, including the arresting officer and the appropriate judges.¹⁸¹ The United States Court of Appeals for the Sixth Circuit, in separate opinions, held that both suits had been properly dismissed by the district court for the reasons described below.¹⁸²

B. *The Tennessee Material Witness Provisions*

In Tennessee, if it appears to the court "by affidavit that the testimony of a person is material . . . and if it is shown that the witness has refused or will refuse to respond to process," the Tennessee material witness provision authorizes the court to "require [the witness] to give bail."¹⁸³ If the witness does not post bail the court has two options: it can either "commit him to the custody of the sheriff pending final disposition of the proceeding in which the testimony is needed" or "order his release if he has been detained for an unreasonable length of time."¹⁸⁴ It is this provision which authorized the city court to require that Clyde

177. *White II*, 892 F.2d at 459.

178. *Id.*; *White I*, 860 F.2d at 663.

179. Section 1983 of the United States Code, title 42 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1988).

180. *White I*, 860 F.2d at 662 n.1.

181. *White II*, 892 F.2d 457.

182. *White II*, 892 F.2d at 464. The case against the prosecuting attorneys was dismissed because White had subsequently filed suit in the Tennessee Claims Commission against the attorneys alleging the same violations. *White I*, 860 F.2d at 664.

183. TENN. CODE ANN. § 40-11-110 (1990). For the full text of this section, see *supra* note 3. Generally these provisions are supported by the doctrine that it is not only the duty of a witness to offer his testimony at a criminal trial, but it is also necessary to afford the defendant a fair trial.

184. TENN. CODE ANN. § 40-11-110 (1990).

White post bail or be detained upon his failure to do so, and, upon which the Sixth Circuit relied in forming its opinion as to the validity of White's detention.

Procedurally, if the aforementioned determinations are made as to a witness' materiality and his unwillingness to testify, bail may be set in accordance with section 40-11-117 ("Bail security required"), of the Tennessee bail statute.¹⁸⁵ In evaluating the actual treatment of a witness under section 40-11-117, and section 40-11-115 ("Release on recognizance or unsecured bonds"), the court is referred to section 40-11-116 ("Conditions on release") which requires that "the magistrate . . . impose the least onerous condition reasonably likely to assure the [witness'] appearance in court."¹⁸⁶ The factors to be considered from section 40-11-115 include the witness' "employment," "reputation," "family ties" and "financial condition."¹⁸⁷ In essence, the Tennessee legislature set forth these factors to serve as the standards by which the determination is to be made as to whether the witness will appear at

185. TENN. CODE ANN. § 40-11-117 (1990). This section states that: "Absent a showing that conditions on a release on recognizance will reasonably assure the appearance of the [witness] as required, the magistrate shall, in lieu of the conditions of release set out in § 40-11-115 or § 40-11-116, require bail to be given." *Id.* This section implicitly recognizes that before bail is set, it must be *first* shown that the "conditions on a release on recognizance will [not] reasonably assure the appearance" of the witness at trial. *Id.*

186. TENN. CODE ANN. § 40-11-116 (1990). For the full text of § 40-11-116, see *supra* note 3. Before the court reviews the conditions listed in § 40-11-116 and considers them as potential options, it must first decide that the witness should not be released on his own recognizance in accordance with § 40-11-115. See TENN. CODE ANN. § 40-11-115 (1990). Section 40-11-115 states that the "magistrate *shall* take into account [the following factors]" in making the determination of whether a release on the witness' own recognizance will be sufficient to assure the witness' presence at trial. *Id.* (emphasis added). For the full list of factors under § 40-11-115, see *supra* note 3.

In short, the structure of the Tennessee material witness provisions as a whole is as follows: Section 40-11-110 ("Bail for material witnesses") refers the court to § 40-11-117 ("Bail security required") which then refers the court to § 40-11-116 ("Conditions on release"). TENN. CODE ANN. §§ 40-11-110, -116, -117. Section 40-11-117 allows that bail may be set "in lieu of the conditions of release set out in § 40-11-115 or 40-11-116" if there is first a "showing that conditions on a release on recognizance will [not] reasonably assure the appearance of the [witness]." TENN. CODE ANN. § 40-11-117 (1990). Moreover, § 40-11-116 specifically *requires* the court to "impose the least onerous condition reasonably likely to assure the [witness'] appearance in court." TENN. CODE ANN. § 40-11-116. The Chattanooga City Court judicial officers, however, did not impose the "least onerous" alternative when White's bail was set at an amount which secured his prolonged and undefined incarceration. *White II*, 892 F.2d at 459. Yet, even Judge Jones in his dissenting opinion stated, contrary to the mandatory language of § 40-11-116, that "neither the statutes of Tennessee nor the United States Constitution currently mandates that less restrictive arrangements be made." *Id.* at 465.

187. TENN. CODE ANN. § 40-11-115 (1990). For the full text of this section, see *supra* note 3.

trial, either voluntarily or pursuant to subpoena.¹⁸⁸ Reviewing these factors it is not difficult to understand why a court might be reluctant to release a homeless person on an unsecured personal recognizance bond.¹⁸⁹

IV. ANALYSIS

Clyde White's case presents an extreme example of the dangers faced by unrepresented homeless material witnesses. This analysis will first focus on the obstacles encountered by White as a result of an inherently prejudicial statute and its improper application by the judiciary. In addition, this section will analyze the procedural measures which may have been exercised by White if he had been afforded effective representation. The conclusion which necessarily follows is that a material witness who is threatened with actual incarceration must be provided with the representation of counsel to protect him from the possibility of a lengthy and unjust deprivation of his liberty.

A. *The Tennessee Material Witness Statute: Procedure, Effect, and Prejudice?*

1. *Inherent Prejudice Toward the Homeless Witness*

It cannot be ascertained from the *White II* opinion whether the defendants, Deputy Clerk King, Judge Cox or Judge Bean, reviewed White's status as a material witness or considered the conditions listed

188. *Id.* For the full text of section 40-11-115, see *supra* note 3. For a brief discussion and list of the factors on which a Tennessee judge or magistrate is to rely in making his determination as to the witness' release, see note 187 and accompanying text.

189. TENN. CODE ANN. § 40-11-115 (1990). For the full text of this section, see *supra* note 3. Apparently, the legislature intended these factors, along with "[a]ny other factors indicating the defendant's ties to the community or bearing on the risk or willful failure to appear" to be determinative of whether the witness is sufficiently reliable whereby an unconditioned release will assure his appearance at trial. TENN. CODE ANN. § 40-11-115. As the statute contemplates, the decision to require the witness to post bail or put other restraints on his freedom is left to the court's discretion. See TENN. CODE ANN. §§ 40-11-110, -115, -116 (1990) (court or magistrate given discretion as to appropriate release procedures).

When a witness is not to be released on his own recognizance pursuant to § 40-11-115, the court is to then consider imposing conditions on his release in accordance with § 40-11-116. Section 40-11-116, however, states that the "magistrate shall impose the least onerous" of these conditions. TENN. CODE ANN. § 40-11-116. Depriving a witness of his liberty would be the most onerous condition in light of the options available in § 40-11-116, which allow the court to:

- (1) Release the defendant into the care of some qualified person or organization responsible for supervising the defendant and assisting him in appearing in court [or]
- (2) Place the defendant under the supervision of an available probation counselor or other appropriate public official [or]
- (3) Impose reasonable restrictions on the activities, movements, associations and residences of the defendant

TENN. CODE ANN. § 40-11-116.

in the appropriate sections of the Tennessee statute.¹⁹⁰ In light of the apparent legislative intent to impose upon the witness the "least onerous" condition, however, it is submitted that the aforementioned defendants did not take the proper procedural steps when confronted with White's situation.¹⁹¹

Upon closer examination, the factors listed in section 40-11-115 of the Tennessee statute directly prejudice a homeless witness because his indigence will, in and of itself, cause him to fall short of the required showings.¹⁹² As noted in the 1988 opinion, the judge who set White's bail had substantial testimony from White that he would be willing to

190. TENN. CODE ANN. §§ 40-11-115, -116, -117 (1990). For the full text of these sections, see *supra* note 3.

191. See TENN. CODE ANN. § 40-11-116 (1990). White explained to the judicial officers presiding at his initial bond hearings that he would in fact voluntarily appear to testify. *White I*, 860 F.2d at 663. Hence, the judicial officers at that time were not faced with a recalcitrant witness and, consequently, could have imposed less restrictive alternatives upon White's liberty which would have assured his presence at Denson's trial. Instead, the judicial officials set White's bail at an amount which would do no less than ensure that White remained in custody. Furthermore, if White's willingness to testify had been closely examined, a court could have come to the conclusion, as did the dissent in the 1989 opinion, that because of White's willingness to testify, the court entirely lacked any degree of the probable cause necessary to justify detaining him. See *White II*, 892 F.2d at 464-65 (Jones, J., dissenting).

It should be noted that the judges, regardless of the issue of probable cause, may have felt that the witness' situation, his homelessness and his alcoholism, threatened his appearance at Denson's trial such that they believed incarceration was the only answer. The judges decided on incarceration even though the statute includes alternatives such as: "Plac[ing] the [witness] under the supervision of an available probation counselor or other appropriate public official" or "[i]mpos[ing] any other reasonable restriction designed to assure the defendant's appearance . . . not limited to the deposit of bail." TENN. CODE ANN. § 40-11-116. In comparison to the Bail Reform Act of 1984, which mandates that the witness will not be detained if he lacks the funds to post bail, the Tennessee provisions fall short of attempting to insure that a person is not deprived of his liberty without due process. See 18 U.S.C. § 3142(c)(2) (1988).

192. For the factors listed under § 40-11-115 of the Tennessee statute, see *supra* note 3. These factors may easily be applied to a witness who maintains some sort of employment and has a place of residence. Yet, a witness who has no home and no money will ultimately fall short of the majority of the factors set forth in § 40-11-115 to aid the court in its determination of whether the witness will be required to post bail. TENN. CODE ANN. § 40-11-115 (1990).

The factors to be considered include: employment status, financial condition, family ties and relationships, and reputation. TENN. CODE ANN. § 40-11-115. Although possible, it is unlikely that there will be a responsible member of the community available to vouch for a homeless witness' reliability, if only for the reason that there may be no one sufficiently acquainted with the witness to be able to make such an evaluation. Hence, the inherent circumstances of a homeless person may work to discriminate against him, regardless of his personal character or reliability. As a result, a homeless witness will likely be required to post bail, which of course will cause him to remain incarcerated. This is assuming, however, that the witness is not afforded the representation which may aid him in securing his release or dismissing his bail in exchange for his deposition testimony. For an explanation of how the assistance of counsel can

attend Denson's trial voluntarily.¹⁹³ Moreover, the *White I* opinion states that White had requested the assistance of counsel; had counsel been appointed, motions could have been made which would have expedited his release.¹⁹⁴

If, in fact, the judicial defendants did not investigate whether White had or would have "refuse[d] to respond to process," then there was no justifiable reason to incarcerate him.¹⁹⁵ Accordingly, White argued that "his homelessness was the essential factual basis for the district court's determination that his arrest and detention was authorized."¹⁹⁶ Unfortunately, it is difficult to determine what procedures were employed by King, Cox and Bean in setting and raising White's bail from which either support or opposition for White's allegation could be found.¹⁹⁷ The court merely stated that when King set White's bail, "she did so with

aid an indigent material witness faced with incarceration, see *infra* notes 222-41 and accompanying text.

193. *White I*, 860 F.2d at 663. Interestingly, the 1989 opinion is devoid of any such statements made by White other than the statement made to the detective when he was first arrested. See *White II*, 892 F.2d at 458-59.

In the 1988 opinion, the court noted that White "assur[ed] [the judge] that he would appear" and "request[ed] that he be released upon his own recognizance." *White I*, 860 F.2d at 662-63. These requests to be released were denied on October 12, 1984, at White's initial bond hearing, and on October 18, 1984, at White and Denson's preliminary hearing. *Id.* at 663.

194. *White I*, 860 F.2d at 663. For a discussion of the necessity of counsel, especially in the situation where a witness is taken into custody for an indefinite amount of time, see *infra* notes 222-41 and accompanying text.

195. According to § 40-11-110 of the Tennessee bail statute, a court is authorized to incarcerate a material witness who fails to post bail: (1) "If it appears by affidavit that the testimony of a person is material to any criminal proceeding" and (2) "it is shown that the witness has refused or will refuse to respond to process." TENN. CODE ANN. § 40-11-110 (1990). These two factors constitute the probable cause necessary to arrest and detain a witness; without both of these factors having been satisfied by some sort of investigation or supporting affidavit, a witness may not be legitimately detained. For a discussion of the probable cause element, see *supra* notes 47-72 and accompanying text. See also *White II*, 892 F.2d at 464-65 (Jones, J., dissenting).

196. *White II*, 892 F.2d at 464. For a discussion of the application of the Tennessee statute to indigent and homeless witnesses, see *supra* notes 192-94 and accompanying text.

197. The procedure necessary to satisfy the probable cause requirement would have mandated that the court inquire into whether White was willing to appear before the court and testify at the trial of the alleged murderer. The court, according to the Tennessee statute, should have been able to make this determination based on the affidavit. TENN. CODE ANN. § 40-11-110 (1990). For a discussion of the affidavit used in *White*, see *infra* notes 199-208 and accompanying text. Whether the defendants properly followed any of the procedures pursuant to §§ 40-11-110, -115, -116, or -117 cannot be determined because the Sixth Circuit's reported opinion is devoid of any indication as to whether the defendants made the proper inquiry regarding White's willingness to appear or whether they had considered more feasible and less onerous alternatives, rather, the Sixth Circuit simply concluded that the defendants had the necessary probable cause to detain White.

authority and in accordance with the governing statute.”¹⁹⁸ If the court actually did consider the factors of section 40-11-115, it would become obvious that the provision works as an undefeatable barrier against homeless people.

2. *The Deficiency of the Affidavit as a Basis for a Finding of Probable Cause*

According to the Tennessee statute authorizing the court to set bail for a recalcitrant witness the court is to rely on an affidavit to determine whether “the witness has refused or will refuse to respond to process.”¹⁹⁹ If such a finding is made, the court may then proceed by “requir[ing] [the witness] to give bail . . . for his appearance” and “commit[ing] him to the custody of the sheriff” if he fails to do so.²⁰⁰ The affidavit in White’s case listed White as a “state’s witness.”²⁰¹ No

198. *White II*, 892 F.2d at 464. Section 40-11-110 of the Tennessee bail statute requires a showing of probable cause. TENN. CODE ANN. § 40-11-110 (1990). Yet, the court felt that defendant King had conformed with this statute. *White II*, 892 F.2d at 464. King, however, made no inquiry or investigation which would have amounted to a showing of probable cause as to whether White’s testimony was material and whether he would refuse to respond to process. *Id.* at 463. For a discussion of the dissent’s opinion in *White II* regarding the lack of probable cause, see *infra* notes 209-21 and accompanying text.

199. TENN. CODE ANN. § 40-11-110 (1990). For the full text of this section, see *supra* note 3. This procedure is essentially the same throughout the state material witness provisions as well as the federal provisions. For a discussion of the various state and federal provisions, see *supra* notes 25, 26, 39 and *infra* note 239.

Both the Tennessee material witness provisions and the federal provisions allow the court to rely solely on an affidavit to make the required determinations which work to meet the probable cause showing. See 18 U.S.C. § 3144 (1988); TENN. CODE ANN. § 40-11-110 (1990).

The Connecticut material witness provision provides that if any state’s attorney makes out a written complaint alleging “(1) that a person named therein is or will be a material witness in a criminal proceeding . . . and (2) that the state’s attorney believes that such witness is likely to disappear from the state . . . refuse or fail to appear . . . as a witness . . . the court shall issue a warrant.” CONN. GEN. STAT. ANN. § 54-82j (West 1985). In regard to arrest procedures, the Iowa Code provides that, so long as the arresting officer has “probable cause to believe that a person is a necessary and material witness to a felony and that such person might be unavailable for service of a subpoena, the officer may arrest such person as a material witness with or without an arrest warrant.” IOWA CODE ANN. § 804.11 (West 1979).

For a discussion of other state statutes, see *supra* notes 25, 37, 39 and *infra* note 239.

200. TENN. CODE ANN. § 40-11-110 (1990).

201. *White II*, 892 F.2d at 463. King had provided this statement of White’s classification in the space which required a statement of the offense with which the defendant or witness had been charged. *Id.* The affidavit in White’s case was set forth by Detective Angel before Deputy City Court Clerk Connie King, following White’s arrest. *Id.* at 459.

The Sixth Circuit noted that the district court judge “for the purpose of his opinion, assumed that King did set White’s bail.” *Id.* at 464 n.5. It appears clear from the record that King did not set White’s bail, rather, she only issued the affidavit of complaint against White which in and of itself was deficient. See *id.* at

determination, however, was made at that time as to whether there was any reason to believe White would or would not willingly appear at Denson's trial.²⁰² In fact, the Sixth Circuit conceded that the "affidavit was deficient" in this nature, but the court stated that this error was harmless.²⁰³

As to the affidavit's invalidity and its effect on White's detention, the opinion reads as follows:

[T]he affidavit was deficient because it lacked any assessment of the probability of White's future appearance and testimony at Denson's trial. We agree with the district court that this deficiency in the complaint was harmless in view of Angel's valid authority to arrest White as a material witness and in view of the fact that, within twenty-four hours of his arrest, White appeared before Judge Cox and was given the opportunity to make bail.²⁰⁴

Had the affidavit been used simply to establish the authority to arrest White, the "deficiency" may have constituted harmless error because White's arrest had been based on an independent finding of probable cause.²⁰⁵ Yet, the court's authority to detain a witness also rests on this affidavit.²⁰⁶ If Judge Cox, who first set the bail in the amount of \$500, and Judge Bean, who raised the bail to \$1,500, relied on this affidavit to make their determination of whether White's testimony was "material" and whether White "has refused or will refuse to respond to process," the "deficiency" of this affidavit was crucial to the outcome of White's

463 (court states: "the affidavit was deficient because it lacked any assessment of the probability of White's future appearance and testimony at Denson's trial"). Whether or not King's actions inflicted "constitutional injury" upon White was irrelevant, as the Sixth Circuit held that King was "entitled to absolute immunity" because "setting bail is a quasi-judicial activity." *Id.* at 464. Although King did not set White's bail, she did issue an affidavit of complaint in compliance with Rule 5 of the Tennessee Rules of Criminal Procedure; apparently, this is also a "quasi-judicial activity." *Id.* at 459.

202. *Id.* at 463.

203. *Id.*

204. *Id.* The validity of White's arrest was discussed by the court when it addressed White's § 1983 claim against the arresting officer. *Id.* at 460. The relevant section which authorizes the court to set bail for the release of a material witness whose trial attendance is in doubt, does not itself authorize the arrest of a material witness. *See* TENN. CODE ANN. § 40-11-110 (1990). The court, however, felt that "this statute inherently contemplates that material witnesses are subject to arrest and detention under appropriate circumstances. Such an interpretation is necessary to effectuate the statutory authority given to courts to impose bail on material witnesses." *White II*, 892 F.2d at 460. The district court had made this examination of § 40-11-110, with which the Sixth Circuit agreed, because "apparently [no Tennessee court] ha[d] considered whether Tennessee law explicitly authorizes a police officer to arrest and detain a material witness to a crime without first obtaining a warrant." *Id.*

205. *White II*, 892 F.2d at 460.

206. TENN. CODE ANN. § 40-11-110 (1990).

predicament.²⁰⁷ Nonetheless, the Sixth Circuit described the affidavit's deficiency as "harmless."²⁰⁸ From the court's relation of the facts, however, it is quite possible that the judicial officers never addressed the issue of whether bail should have been required at all.

The dissenting opinion of Circuit Judge Nathaniel Jones did address the issue of the district court's failure to investigate the likelihood of White voluntarily appearing before the court to offer his testimony.²⁰⁹ Judge Jones concluded that the "probable cause threshold" had not been met and hence White should not have been detained in the same manner as "Denson, the person charged with murder."²¹⁰ Judge Jones further stated:

[T]he arrest and detention of a citizen as a material witness requires a showing of probable cause under the Fourth Amendment to the United States Constitution because under the Fourth Amendment "the essential element is the physical restraint placed upon the person, not the purpose behind the restraint" . . . [T]he arrest and detention of a witness is an exceptional measure to be employed only in instances where voluntary cooperation appears unfeasible.²¹¹

The "probable cause threshold" addressed by Judge Jones would only have been met if, based on a sworn affidavit, the court had found that White's testimony was material to Denson's criminal charges and that White would likely refuse to appear at Denson's trial.²¹² Had the pre-

207. *White II*, 892 F.2d at 459. The affidavit required by the Tennessee statute serves as the document which validates the arrest and detention of a material witness. See TENN. CODE ANN. § 40-11-110 (1990). In it must appear a showing that the witness' testimony is both material to the incident and a showing that there is reason to believe the witness will not appear before the court at a later date; if these elements are contained within the affidavit, it is presumed that the judicial officer has the necessary probable cause, after evaluating the specific circumstances and character of the witness, to require that the witness post bail. *Id.* Hence, in White's case, the affidavit set forth by Detective Angel and signed by Clerk King, served as the document upon which the probable cause to detain White was based. See TENN. CODE ANN. § 40-11-110.

208. *White II*, 892 F.2d at 463.

209. *Id.* at 464-65.

210. *Id.* at 465. Many cases have acknowledged the fact that situations have arisen where the material witness, detained pursuant to a material witness statute, has remained incarcerated while the actual defendant has been able to post bail and effectuate his release from jail. See Comment, *supra* note 39, at 503 (describing the following: "A defendant charged with highway robbery was released on bail in the usual manner pending trial. At the trial, six months later, it appeared that the complaining witness had throughout this period been incarcerated for his inability to post bond.").

211. *White II*, 892 F.2d at 464-65 (Jones, J., dissenting) (quoting *Bacon v. United States*, 449 F.2d 933, 942 (9th Cir. 1971)).

212. *Id.* at 465. Although White made other statements affirming his commitment to appear before the trial court at Denson's hearing, neither the majority nor the dissent acknowledged such statements. *Id.* In the Sixth Circuit's

siding judicial officers, after sufficient inquiry, then concluded that White was a recalcitrant witness, the requirement of probable cause would thereby have been satisfied.²¹³ Apparently, no such investigation was conducted and, therefore, the court's detention of White was unsubstantiated by any showing of probable cause as required by the fourth amendment.²¹⁴ The court, however, despite the lack of probable cause, felt that it was necessary to detain White for 288 days based on the fact that he had once stated that "he preferred not to be a 'snitch.'" ²¹⁵

In his dissent, Judge Jones further criticized the majority's dependence on this statement as well as White's one statement that "he would like to not have to testify."²¹⁶ Judge Jones argued: "These statements do not imply a refusal."²¹⁷ Rather, he felt that few innocent bystanders "would be undaunted by the thought of having to testify to the occurrence of a murder, and White's statements merely reflected his understandable fear of this prospect."²¹⁸

If an indigent or homeless witness is taken into custody because his testimony is deemed material by the court or the arresting officer, his willingness to testify should serve as the decisive factor as to whether he should remain in custody. Only that witness who does not want to testify, who will refuse to respond to process and who is also unable to afford the bail set by the court should be turned over to the custody of the state pending his appearance in court.²¹⁹ From a review of White's statements as reported in the 1988 opinion, he did in fact represent to the judicial officials that he was willing to testify.²²⁰ It therefore follows that, as White was not a recalcitrant witness, he should not have been detained.²²¹

1988 opinion regarding White's claims against the prosecuting attorneys, however, statements assuring White's appearance were recorded by the judicial officials presiding over White's bond hearings. *White I*, 860 F.2d at 663. For a discussion of the statements made by White at this time, see *supra* notes 169-73 and accompanying text. See also TENN. CODE ANN. § 40-11-110 (1990).

213. *White II*, 892 F.2d at 464-65.

214. For a discussion of the fourth amendment as it relates to the physical seizure of a material witness, see *supra* notes 47-72 and accompanying text. Specifically, the court in *Cochran* recognized the rights which automatically attach when a person is deprived of his liberty. Application of *Cochran*, 434 F. Supp. 1207, 1212 (D. Neb. 1977).

215. *White II*, 892 F.2d at 464. For a discussion of the invalidity of the affidavit attesting to White's "preference" not to be a "snitch," see *supra* notes 199-208 and accompanying text.

216. *White II*, 892 F.2d at 465.

217. *Id.*

218. *Id.*

219. TENN. CODE ANN. § 40-11-110 (1990).

220. *White I*, 860 F.2d at 663.

221. U.S. CONST. amend. VI. For a discussion of the sixth amendment confrontation clause, see *supra* notes 48-50 and accompanying text.

B. *The Lack of Assistance of Counsel and Its Effect on the Homeless*

Representation by counsel is essential to the disposition of a material witness who is arrested and then threatened with the possibility of incarceration. Once a witness has been indefinitely detained and is awaiting the trial of a defendant against whom he is to testify, there is little he will be able to do to remedy his situation without the aid of counsel.²²² Without such assistance, it is difficult for an indigent or homeless material witness to procure his own release or be assured that the judges who set his bail will comply with the statutory requirements.²²³ Instead, as in *White's* case, a witness can remain incarcerated until his testimony is given at trial even though he states that he will voluntarily offer his testimony when needed.²²⁴

If a witness has the assistance of counsel, effective procedures can be employed to aid the witness and assure that any detention by the court is in fact warranted. For instance, counsel may move for an order to depose the witness instead of allowing the court to detain him for an unreasonable length of time.²²⁵ The presence of counsel can also work

222. For a discussion of the procedures for remedying an unlawful incarceration pursuant to a material witness provision, see *supra* notes 141-61 and accompanying text.

223. For a discussion of the doctrine of judicial immunity, see *supra* notes 155-61 and accompanying text. See also 1 COOK & SOBIESKI, CIVIL RIGHTS ACTIONS § 2.07 (1990) (in depth discussion of judicial immunity and claims of civil rights violations under 42 U.S.C. § 1983 (1988)).

224. A witness may indeed state that he will voluntarily appear at trial and there may be no probable cause to believe otherwise, yet, without the safeguard of counsel's assistance and representation, the court could still require the witness to post bail and thus create the possibility of prolonged detention for a witness who cannot afford bail. In this type of situation, the court is unlikely to be held liable for such a constitutional infringement, under the doctrine of judicial immunity. See *White II*, 892 F.2d at 461-64.

225. In the following cases, motions were granted ordering depositions to be taken of material witnesses held pursuant to a material witness provision. The motions were presented by the witness' counsel in each circumstance. Each of these cases involve the federal material witness provisions.

In *United States v. Rivera*, 859 F.2d 1204, 1205 (4th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989), illegal aliens had counsel appointed for them by the court. The counsel "shortly thereafter . . . made a motion to have their testimony taken by deposition pursuant to the Material Witness Statute, 18 U.S.C. § 3144 and the Federal Rule of Criminal Procedure 15." *Id.* (footnotes omitted). The motion also requested that the witnesses be "released from custody and allowed to leave the country." *Id.* at 1206. The motion was granted by the trial court which stated:

Exceptional circumstances have been shown in that the witnesses are being incarcerated awaiting a trial. And humanitarian considerations alone demand that something be done to release them from incarceration, when their only purpose for being incarcerated is to be witnesses. And whether they voluntarily flee after their depositions have been taken or whether the INS deports them back to their countries of origin is beside the point.

Id. at 1206. Without the assistance of counsel, these witnesses would probably

to ensure that the court will not deprive the witness of his liberty without proper justification.²²⁶ In any case, counsel can effectively put forth the witness' statements as to his willingness or refusal to testify at a later date.

The necessity of counsel was recognized by the United States District Court for the Western District of Texas, in *Class Action Application for Habeas Corpus*, when it enforced section 3142(f) of the Bail Reform Act.²²⁷ The court in *Class Action* held that sections 3144 and 3142 of the

not have been released as they had already been held for approximately three weeks before any motion had been filed with the court. *Id.* at 1205.

A similar situation arose in *United States v. Guadian-Salazar*, 824 F.2d 344 (5th Cir. 1987), where illegal aliens who were material witnesses to a crime were held by the court. In this case, a counsel appointed by the court "filed a motion for the reduction of bond or for taking oral depositions." *Id.* at 345. This motion was granted by the court and the depositions were scheduled. *Id.* The district court, relying on Rule 15(a) of the Federal Rules of Criminal Procedure, found that the "case present[ed] 'exceptional circumstances' and that 'the interests of justice' require[d] the taking of depositions." *Id.* at 346 (quoting FED. R. CRIM. P. 15(a)).

The defendants in the above cases challenged the use of the depositions, claiming that they had been denied the "constitutional right to confront adverse witnesses, guaranteed by the sixth amendment, thereby depriving [them] of due process of law under the fifth amendment to the United States Constitution." *Id.*; see *Rivera*, 859 F.2d at 1206. The *Rivera* court held that the "introduction of these depositions at appellant's trial did not deny him the right of confrontation." *Rivera*, 859 F.2d at 1207. Rather, as the motion to depose was supported by both the witness' counsel and the U.S. Attorney, the *Rivera* court found that the "exceptional circumstances" required by Rule 15(a) were met and that the "witnesses were entitled to release . . . [as] their testimony could be and was adequately secured by deposition." *Id.* at 1208-09. Conversely, the court in *Guadian-Salazar* reversed the defendant's conviction based on the use of the depositions at trial. 824 F.2d at 347. In order to introduce the depositions as evidence the government needed to establish that the witnesses were unavailable to testify. *Id.* At trial, however, the court found that the government failed to make the sufficient showing of the witnesses' unavailability. *Id.* This determination was uncontested by the government and in response the court reversed the defendant's conviction. *Id.*

226. Often, actions brought by material witnesses to procure their release are in the form of a writ of habeas corpus. See *Class Action for Habeas Corpus* 612 F. Supp. 940 (W.D. Tex. 1985); *Application of Cochran*, 434 F. Supp. 1207 (D. Neb. 1977). Hence, if a witness can acquire adequate representation during the bail proceedings, it is possible to insure that the court follows the proper statutory requirements. For example, White lacked the assistance of counsel throughout his 288 day incarceration and thus had no adequate opportunity to challenge the conduct of the court. *White II*, 892 F.2d at 459. Once he was released and had finally obtained counsel, White's § 1983 claim was, for all practical purposes, worthless. The claim was dismissed because of the defendant's judicial immunity and, therefore, White was left without a remedy for his wrongful incarceration. *Id.* at 464.

227. *Class Action*, 612 F. Supp. 940. For a discussion of *Class Action*, see *supra* notes 131-34 and accompanying text.

In pertinent part, § 3144 of the Bail Reform Act "unambiguously provides that material witnesses are to be treated in accordance with Title 18, United States Code, Section 3142 which addresses the release of defendants prior to trial." *Class Action*, 612 F. Supp. at 942. Section 3142 provides that the witness

Bail Reform Act together "clear[ly] . . . contemplate[] the appointment of counsel for defendants that are financially unable to secure representation."²²⁸ Perhaps most significantly, the court explained that "[t]he fundamental requirement of due process is an opportunity to be heard"²²⁹ and that this "opportunity to be heard must be given at a meaningful time and in a meaningful manner."²³⁰ Quoting the United States Supreme Court in *Mathews v. Eldridge*,²³¹ the district court analyzed three factors "to determine what process is constitutionally due."²³² It then applied these factors to the material witness' circumstances.²³³

Beginning with the premise that, "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection,"²³⁴ the court came to the following conclusions. First,

must be given a detention hearing at which time "the person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed." 18 U.S.C. § 3142(f) (1988). Section 3142 of the Bail Reform Act of 1984 provides that

[i]f a judicial officer determines that a defendant should not be released on his own recognizance or on an unsecured appearance bond, a hearing must be held to determine whether any condition or combination of conditions can be imposed upon the defendant that will reasonably assure his appearance at trial and the safety of any other person and the community.

Class Action, 612 F. Supp. at 943 (citing 18 U.S.C. § 3142(a), (b), (c) & (f)).

228. *Class Action*, 612 F. Supp. at 943. The court further explained that the appointment of counsel is supported by recent amendments to the guidelines for the administration of the Criminal Justice Act approved by the United States Judicial Conference at its March 1985 proceedings. *Id.* One such amendment stated: "[T]he Bail Reform Act of 1984 requires that counsel be appointed to provide representation at a detention hearing for a person who has been arrested as a material witness." *Id.* (quoting ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, VII GUIDE TO JUDICIARY POLICIES AND PROCEDURES, sec. A, ch. 2, para. 2.15 (1985)).

229. *Class Action*, 612 F. Supp. at 944 (citing *Parratt v. Taylor*, 451 U.S. 527, 540 (1981)). The due process clause of the fifth amendment, applied to the states by the fourteenth amendment, provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend V.

230. *Class Action*, 612 F. Supp. at 944 (citing *Parratt v. Taylor*, 451 U.S. 527, 540 (1981); *Armstrong v. Manzo*, 380 U.S. 545 (1965)).

231. 424 U.S. 319 (1976).

232. The factors are stated as follows:

First, the private interests that will be affected by the official action; second, the risk of erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

233. *Id.* at 944-45.

234. *Id.* at 944 (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)). The court also relied on Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951). *Class Action*,

"[t]he private interests at stake where material witnesses are concerned strike at the very heart of the values sought to be protected by our Constitution—liberty."²³⁵ Second, the "risk of erroneous deprivation of an individual's liberty" mandates the need for counsel to safeguard against "erroneous" deprivations of a witness' liberty.²³⁶ Finally, the court concluded that, although the courts may be burdened with more administrative proceedings in order to resolve the issues surrounding a witness' incarceration, the "additional burden on the Court and on counsel is more than outweighed by the liberty interest of material witnesses."²³⁷

In *Application of Cochran*,²³⁸ the United States District Court for the District of Nebraska, dealing with a Nebraska material witness provision,

612 F. Supp. at 944. For Justice Frankfurter's comment on the right to be heard, see *supra* text accompanying note 137. See also *supra* notes 110-18 and accompanying text for the Supreme Court's analysis of the relationship between incarceration and the requirement of counsel in criminal proceedings.

235. *Class Action*, 612 F. Supp. at 944. The court further noted that if the situation does arise where it is necessary to detain a material witness, thereby depriving him of his liberty, § 3144 requires that the witness "be deposed if certain requirements are met." *Id.* at 945. In this way, both the liberty interests of the witness as well as the sixth amendment interests of the defendant can be protected.

236. *Id.* at 945. For instance, the need to depose a witness for the purpose of securing his release will often require a motion or request by the witness' attorney. The absence of counsel at that time would "not only create the risk of erroneous deprivations of liberty, but also create the risk of unnecessarily prolonged deprivations of liberty." *Id.* The assistance of counsel can be particularly determinative as to the extent of a witness' detention if that witness is indigent. For example, any witness taken into custody who cannot post bail will want to procure his release by giving his deposition. This will require a motion by counsel and possibly an argument before the court on why it would be unjust to detain the witness. For cases where counsel challenged material witness provisions and their execution as violative of witness constitutional rights and cases involving the federal deposition procedures, see *supra* notes 146-54.

The district court in *Class Action* also listed three specific reasons why it viewed the assistance of counsel as "beneficial to individuals incarcerated as material witnesses." *Id.* at 945. The court stated:

Appointment of counsel will ensure 1) that it is appropriate to detain the individual as a material witness; 2) that the individual will not be incarcerated when there are other means available to secure his presence at trial; and 3) that any incarceration of an individual will not be prolonged unnecessarily.

Id. at 945-46.

Under the Tennessee provisions, if an indigent or homeless witness asserts that he would not like to be a "snitch," and is then taken into custody pursuant to Tennessee's material witness provision, he will almost certainly be detained until the time his testimony can be given at trial. The reason for such an outcome is that he will not be able to afford any bail the court might set to secure his testimony. Furthermore, there will be no counsel who can argue to the court that the witness has been held for an unreasonable length of time, that the bail should be lowered or that a deposition order should be granted.

237. *Class Action*, 612 F. Supp. 946.

238. 434 F. Supp. 1207 (D. Neb. 1977).

came to similar conclusions.²³⁹ There the court stated that "the right to counsel . . . is so frequently a crucial element of due process."²⁴⁰ The court viewed a material witness' right to counsel as one which would aid the witness in retaining his liberty until and unless there is a constitutionally valid justification for taking it away.²⁴¹

The argument in favor of effective representation for any material witness who is arrested and faced with the possibility of incarceration is based upon the premise, inherent in our society, that every individual retains a profound liberty interest which cannot be denied unless just cause has been shown to limit it. If White had the benefit of counsel during his prolonged incarceration, such counsel may have been able to procure White's release either through an order requiring that the parties take his deposition or by an order requiring that the court reduce his bail. Furthermore, if counsel had represented White during the initial stages of his detention proceedings, White could have been assured that the judicial officers would have followed the proper statutory procedures. Specifically, counsel could have worked to demand that any requirement to post bail be based on a showing of probable cause and that other forms or conditions of release be considered. If witnesses are persecuted because the court fails to make sufficient probable cause determinations and counsel is not available to protect a witness when the court acts erroneously, few indigent witnesses, including those who live

239. *Id.* at 1216. The Nebraska material witness provisions involved provided:

When the magistrate is satisfied that any witness against the accused will not appear and testify at the trial, he may, when the offense charge is a felony, order him to recognize with sufficient securities. Any person may recognize for a married woman or minor to appear as a witness, or the magistrate may take the recognizance of either in a sum not exceeding one hundred dollars, which shall be valid notwithstanding the disability of coverture or minority.

NEB. REV. STAT. § 29-507 (1943).

If any witness so required to enter into a recognizance refuses to comply with such order, the magistrate shall commit him or her to jail until he or she complies with such order or is otherwise discharged according to the law.

Id. § 29-508 (1943).

240. *Cochran*, 434 F. Supp. at 1214 (citing *In Re Gault*, 387 U.S. 1 (1967)); see also *Morrissey v. Brewer*, 408 U.S. 471 (1972) (Brennan, J., concurring).

241. *Cochran*, 434 F. Supp. at 1214. The court compared the circumstances of a material witness to those of a person facing charges of delinquency in juvenile court. *Id.* These circumstances, insofar that they deprive a person of his liberty when he has committed no crime, can also be compared to those of a person who is to be committed to a mental hospital. In *Vitek v. Jones*, 445 U.S. 480 (1980), a prisoner in the state prison was to be transferred to a mental hospital. The question presented before the Supreme Court was whether this involuntary transfer "implicate[d] a liberty interest that is protected by the Due Process Clause." *Id.* at 487. The Court concluded that due process was required under such circumstances. *Id.* at 491. Furthermore, the court held that it is "appropriate that counsel be provided to indigent prisoners whom the State seeks to treat as mentally ill." *Id.* at 497.

on the streets in a position to witness a wide range of criminal activity, will voluntarily come forth with crucial information.

V. CONCLUSION

There can be no justification for denying a material witness his liberty if and when he informs the court that he will voluntarily appear to testify. If the witness is less than willing, and the court believes he will not appear to testify, it is within the court's discretion to place conditions on his liberty or require him to post bail. The protections which the due process clause guarantees, however, must be afforded in situations where the court acts effectively to deprive an innocent person of his freedom. Nothing is more crucial, nor more a part of our society's foundation, than the basic rights of liberty and due process. The right to be heard and represented by counsel is not only necessary "to any proceeding where an individual is for the first time threatened with a loss of liberty" but is "required" under the due process clause.²⁴² If an indigent homeless witness is to be incarcerated because he cannot afford bail, he is entitled to be heard under the due process clause of the fifth and fourteenth amendments. Only the assistance of counsel can assure that a witness will be heard and that those who are required to listen will fulfill their duty.

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242. *Class Action*, 612 F. Supp. at 944, 947. The court in *Class Action* applied the rationale of both *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932), as well as the test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), to a material witness' case. *Class Action*, 612 F. Supp. at 944, 947. In conclusion, the court found that without the assistance and protection of counsel, "individuals that are incarcerated without being charged with criminal activity are afforded less protection than individuals charged with criminal activity." *Id.* at 945 (footnote omitted).